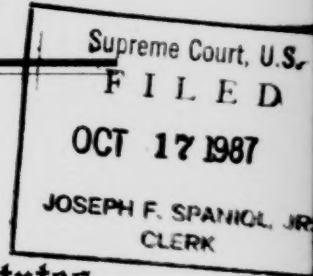


87 736 (1)



IN THE  
**Supreme Court of the United States**  
October Term, 1987

Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

*Petitioner,*

v.

New York State Commission on Judicial Conduct,

*Respondent.*

**On Petition for a Writ of Certiorari to the  
Court of Appeals of the State of New York**

**PETITION FOR A WRIT OF CERTIORARI**

BERTRAM R. GELFAND  
*Counsel for Petitioner*  
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(212) 994-1555

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### Questions Presented

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution apply in a proceeding to remove a state judge pursuant to state law?

2. If the due process provision of the Fourteenth Amendment does apply, does it preclude the removal of a judge from office based upon findings as to charges of which he never received notice and never had the opportunity to defend?

3. Can the New York Court of Appeals circumvent the due process provision of the United States Constitution by finding with reference to a proceeding of the New York State Commission on Judicial Conduct, (the administrative body involved in disciplinary proceedings) that "it was unnecessary and indeed improper for the





## II

Commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature. -- \*\*\* Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds," and then go on to make its own plenary findings which themselves go beyond any charged conduct and utilize this uncharged conduct as the foundation for affirming the removal from office of petitioner?

4. Should the United States Supreme Court tolerate such shockingly wrong conduct as allowing the only Court involved in the judicial disciplinary process of a state to wrongfully deprive a respected jurist of office in violation of the due process provision of the Fourteenth Amendment of the United States Constitution, and leave the jurist without



### III

a single avenue of review?

5. Does it not in itself violate the due process provision of the Fourteenth Amendment for the New York Court of Appeals to ignore the determinations of the United State Supreme Court that once a record has been poisoned by proof and findings which go beyond the charged conduct, there exists a right to a new hearing, particularly where proof as to the uncharged conduct and the findings based thereon are of an inflammatory nature?



#### IV

##### **Parties**

The parties to the proceeding below  
are listed in the caption.



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In the  
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

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In the Matter of the Honorable  
Bertram R. Gelfand, Surrogate, Bronx,  
County

Petitioner,

For Review of a Determination of  
State Commission on Judicial Conduct,

Respondent.

On Petition for Writ of Certiorari to the  
Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bertram R. Gelfand,  
respectfully prays that a writ of  
certiorari issue to review a judgment of  
the New York State Court of Appeals, which  
accepted, *PER CURIAM*, the determination of  
the New York State Commission on Judicial  
Conduct that petitioner be removed from



his office as Judge of the Surrogate's Court of Bronx County.

**Opinions Below**

The opinion of the Court of Appeals of the State of New York is not yet reported and is set forth in the Appendix (pages A-37 to A-46). The Determination of New York State Commission on Judicial Conduct is not officially reported and is set forth in the Appendix (pages A-6 to A-36). The judgment of the Court of Appeals was entered July 2, 1987 and a motion seeking to re-argue and for reconsideration of said judgment was denied, without opinion, on August 27, 1987. The Formal Written Complaint that is the foundation of the entire proceeding is set forth in the Appendix (pages A-1 to A-5). The jurisdiction of this Court to review the judgment of the New York Court of Appeals by Writ of Certiorari is conferred by 28 USC 1257 (3).





## STATEMENT OF CASE

### New York State's Judicial Disciplinary Procedure

Pursuant to the New York State Judiciary Law, Article 2-A there is created an eleven member, part time, judicial disciplinary commission consisting partially of judges, practicing lawyers and lay individuals (Judiciary Law, Sec. 44). The commission has the power on complaint, or its own initiative, to investigate judicial conduct and upon completing its investigation to close the matter or to file a formal complaint, which it then refers to a referee of its selection to hear and report (Judiciary Law, Sec. 44). The commission then reaches a determination as to acceptance of its referee's report and as to an appropriate sanction, and forwards its determination to the New York State Court of Appeals. If the subject of the



proceeding does not seek review within 30 days, the commission's determination becomes final. If such a review is sought, the Court of Appeals has exercised the power to not only pass on all questions of law and fact, but apparently within the framework of Judiciary Law, Section 44 (9) to make its own independent findings of fact. The State Commission on Judicial Conduct initiated the proceeding by issuing a formal written complaint against petitioner which is set forth in the Appendix (pages A-1 to 5).

Previously, by an administrator's complaint, dated December 5, 1985, the Commission had commenced a six month investigation into certain broad allegations of misconduct on the part of petitioner, all of which involved a private relationship with one of his 42 employees. At the completion of its investigation, it issued a formal



complaint containing eight specific allegations.

Significantly, the complaint:

(1) contained no charge of misconduct prior to August 3, 1985; (2) contained no charge of misconduct relating to petitioner's performance of either his judicial function or administration of his staff; (3) did not allege that the employee's 1985 resignation resulted from her personal relationship with petitioner (one of the original charges investigated by the Commission); and (4) did not allege that petitioner attempted to prevent the former employee from obtaining legal employment (an original charge investigated by the Commission).

Petitioner filed a verified answer and prepared to meet the charges in the written complaint at the hearing. Petitioner and his counsel acted reasonably in preparing to meet the



allegations of the complaint only, and in expecting that, as the Judiciary Law provides, the hearing would be conducted only "with respect to" those allegations and not with respect to the initial allegations which had been investigated, considered and rejected by the Commission (Judiciary Law, Sec. 44 (4)).

Over objection, the Referee permitted the introduction of evidence that went beyond the formal complaint both as to time and subject matter. In petitioner's reply memorandum to the Referee petitioner vigorously opposed the Commission's effort to convict petitioner on the uncharged offenses.

Petitioner's protest was neither addressed nor respected by the Referee. The Referee issued his report dated December 31, 1986. The report contained 33 findings of fact, 20 of which related to events pre-dating the August 3, 1985





through December 1985 period referred to in the complaint, and unrelated to the charges in the formal complaint. The report also contained a lengthy recitation of highly prejudicial "evidence". The report ended with two conclusions of law. The Referee first concluded that the charges against petitioner in the complaint had been sustained by the evidence. The Referee next reached a conclusion of law relating to matters outside of the complaint:

"In allowing a personal relationship with a member of his official staff to influence his administrative decisions pertaining to that person's continued employment or termination of employment with his office, respondent failed to uphold and maintain the high standards of conduct appropriate to his office as Judge of this state. He engaged in impropriety by inextricably intermingling his personal interests with his official administrative duties and responsibilities. By his conduct, respondent created the appearance of impropriety, as well as bringing disrepute to the office he holds. His conduct was prejudicial to the proper administration of the Office of Surrogate of Bronx County."

This pattern was repeated before



the Commission. Counsel to the Commission moved to have the Commission confirm the report. The Memorandum of Law by Counsel to the Commission in support of his Motion to Confirm the Referee's Report dated January 2, 1987 repeated the unfair approach used before and embraced by the Referee, and recommended that petitioner be removed from office on the basis of uncharged conduct. Again, petitioner objected to the adoption of any portion of the Referee's Report which fell outside of the complaint. Petitioner argued that, as Commission's Counsel had conceded prior to hearing, the extreme sanction of removal was not warranted by the specific charges of the formal complaint. Petitioner pointed out that the principal finding of the Referee that he had allowed his personal relationship with a member of his staff to influence his administrative decisions with respect to her continued



employment was never charged, and if charged could have been disproven, as it was in the investigatory stage of the proceedings. What is totally side-stepped is the undisputed fact that in the investigatory stage, the issue of whether petitioner was professionally justified in firing Ms. Gertel was completely examined and no charge was ever voted that petitioner was not justified in requesting and receiving her resignation on July 21, 1985, effective September 4, 1985.

It is not disputed that the deftly worded allegation number 4 (a) in the complaint (A-2) is not a charge that petitioner fired Ms. Gertel on August 3, 1985, it is simply an allegation that he made such a statement to her. It is also not disputed that her employment had previously terminated effective September 4, 1985 pursuant to her letter of resignation dated July 21, 1985.



Likewise, it is also not disputed that petitioner's statement of Saturday, August 3, 1985 that accelerated her termination to August 2, 1985 was withdrawn by petitioner on Sunday, August 4, 1985, and was never acted upon. None of these points constitute issues of fact in the proceeding.

Thus, the complaint in no respect alleges wrongful discharge for personal reasons or otherwise. It merely alleged the making of a statement relative to discharge for personal reasons which statement was made in anger, was almost immediately withdrawn, and was never acted upon. That these are the circumstances surrounding that statement is not an issue of fact in the case and never was an issue of fact in the case.

Based upon the Referee's report, the Commission's Determination contained 44 findings of fact, 24 of which concerned





a time period and subject matter outside of the allegations in the formal complaint. The Commission's 44th finding of fact relating to petitioner's "candor" contained 11 sub-parts, 5 of which related solely to events outside of the complaint and whose gravamen could not help but influence the remaining subdivisions of this finding.

Under New York statute, the Commission's finding becomes binding if a review is not sought from the New York Court of Appeals within 30 days of the Commission's Determination. Petitioner exercised his right to such a review. Although the petitioner was represented by new counsel on appeal, the Court of Appeals *sua sponte* took the case outside of the time schedule provided for under its usual rules and accelerated the time for filing briefs and argument in accordance with the campaign of an



aspirant to petitioner's position who wished the matter to be heard before the Court's summer recess so that if petitioner were removed, there would be an election in 1987.\*

The Court of Appeals in disposing of the matter rendered an opinion in which it determined:

"Accordingly, it was unnecessary and indeed improper for the commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature -- which preceded the dates covered by the complaint or to consider such conduct in its determination of sanction. Indeed, the Commission's responsibility to safeguard the public's trust in the judiciary by both shielding innocent judges from unjust charges and exposing and disciplining those who have abused their office is not fulfilled where uncharged conduct forms the basis of its published determination. Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds..." (Emphasis added) (A-44, A-45)

\*Ironically despite an immense media campaign geared to smear petitioner, this person never succeeded in qualifying to become a candidate in the election to succeed petitioner.



The Court of Appeals then went, in apparent reliance on Judiciary Law, Sec. 44 (9), to not simply review the Commission's findings of fact, but to arrive at its own findings of fact which did not merely reduce the Commission's findings, but resulted in new findings that exceeded the framework of the Formal Written Complaint against which petitioner was defending himself.

Judiciary Law, Sec. 44 (9) reads as follows:

"In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction."

That the Court of Appeals embarked on new findings against petitioner which exceeded the perimeters of the Formal Written Complaint was not only offensive



to the due process provision of the United States Constitution, but exceeded the authority granted to it by the statute. Once the Court of Appeals found that the Commission's findings of fact were recklessly and prejudicially in excess of the bounds of the complaint, it either had to reduce the sanction, dismiss the complaint, or remand the matter for a new hearing. It certainly could not compose a whole new set of findings that went beyond the complaint in order to salvage the sanction recommended by the Commission.

The gravamen of the Court of Appeals own review of the evidence is as follows:

"Upon full factual review of the evidence adduced before the referee (NY Cons art 6, Section 22[d]; Judiciary Law Section 44 [9]), we conclude that, during the period of August 3, 1985 to December 31, 1985, petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance





when she refused to continue their  
affair." (Emphasis added) (A-39, A-40)

The Court of Appeals went on in its decision to make further findings of uncharged conduct as follows:

"Petitioner confronted the boyfriend, accused him of "harboring" the law assistant and threatened to speak to his employer, the Bronx County District Attorney, to have him fired\* if he did not reveal the whereabouts of the law assistant." (A-41)

"We conclude that this conduct constituted inexcusable violations of sections 100.1 and 100.2 of the Code of Judicial Conduct." (A-42)

The ultimate conclusion of the Court of Appeals was that: "...the determined sanction of removal is accepted, without costs." (A-45)

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\*Petitioner was never charged with threatening to have the "boyfriend" fired. This elaboration arose for the first time in hearing testimony that went beyond the charges.



## Reasons for Granting the Writ

The New York State Court of Appeals specifically found that the Commission had violated petitioner's due process rights under the United States Constitution by making numerous findings against him with reference to conduct which was beyond the framework of its very limited complaint. The findings which went beyond the complaint, were matters which petitioner never had the opportunity to defend against, and to which he had good and valid defenses. They were also highly inflammatory. The Court of Appeals itself refereed to them as "often of a sensational nature." While the New York State Court of Appeals indicated it was disregarding this extraneous matter, it, nevertheless, quoted the most inflammatory aspects of it in referring to the commission's report.

More seriously, the Court of Appeals



after condemning the commission for its unconstitutional conduct in exceeding the complaint, went on to find petitioner guilty of conduct not contained in the formal complaint, to wit: "...petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue their affair." (Emphasis added) (A-40)

At no point in the complaint is petitioner alleged to have made an administrative or personnel decision either to prolong a sexual relationship or to exact personal vengeance. At no point in the complaint is petitioner alleged to have made implicit or explicit threats to



court officials or others in order to prolong a sexual relationship or exact vengeance. These horrendous and very inflammatory findings are not remotely within the framework of the complaint against which petitioner defended himself.

Thus, petitioner, a jurist for 14 1/2 years, with an exceptionally distinguished record\* and 13 1/2 years remaining on his present term, has been deprived of a substantial property right (his office and his reputation) by his removal from office on allegations that he

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\*Petitioner's record as a jurist has been so outstanding that on five occasions he was included in groups of from four to seven judges forwarded to the Governor of the State of New York by the State Commission on Judicial Nominations as exceptionally well qualified for the Governor to appoint the state's highest court. On one occasion he was one of nine judges which the same Commission forwarded to the Governor as being exceptionally well qualified to be appointed Chief Judge of the State of New York. The Referee selected by the Commission on Judicial Conduct to sit on petitioner's case was an unsuccessful competitor of petitioner's to  
(Continued on next page)





never had an opportunity to defend in violation of his right under the United States Constitution.

An additional statutory penalty that flows from the Court of Appeals' finding is to disqualify petitioner from holding judicial office for life. There can be no doubt that procedural due process is required in a hearing pursuant to Section 44 of the Judiciary Law where a judge may be removed from office and, if removed, will be rendered ineligible to hold any other judicial office. Judiciary Law Section 47. If an individual has a legitimate claim of entitlement to hold a particular position, such as tenure,

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be on the nomination list for Chief Judge of the state. Petitioner is the only state trial level judge so honored by the Commission on Judicial Nominations to be chosen among the select few that were "found exceptionally well qualified" for the position of Chief Judge or Associate Judge of the Court of Appeals.



deprivation of that position, constitutes deprivation of property.

See Perry v. Sinderman, 408

U.S. 593, 601-03 (1972); Colm v. Vance, 567 F. 2d 1125, 1127-29 (D.C. Cir. 1977).

The ability to pursue a particular occupation is a liberty interest, and to foreclose an individual's opportunity to pursue a career by barring him from that career or firing him in a manner which imposes such a stigma that it will prevent him from obtaining employment in that career, constitutes deprivation of liberty. See Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972); Cox v. Northern Virginia Transportation Comm., 551 F. 2d 555, 558 (4th Cir. 1976). Due process interests extend to the right to practice law, see e.g., In re Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919 (1968), and the right to remain



in judicial office. See Sarisohn v. Appellate Division, Second Department, Supreme Court of the State of New York, 265 F. Supp. 455, 458 and n. 1 (E.D.N.Y. 1967).

As the Supreme Court stated in the seminal case of Mullane v. Central Hanover Bank & Trust Co.,

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance ...

But when notice is a person's due, process which is a mere gesture is not due process."

339 U.S. at 314-315 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has established specific guidelines for providing notice which comports with the due process requirements of the Fourteenth Amendment.



In an action involving dismissal of a tenured professor that court held that, in such employment actions, a party is entitled to:

1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;

2) notice of both the names of those who have made allegations against the [individual] and the specific nature and factual basis for the charges;

3) a reasonable time and opportunity to present testimony in his or her own defense; and

4) a hearing before an impartial board or tribunal."

King v. University of Minnesota, 774 F. 2d 224, 228 (8th Cir. 1985, cert. denied, 106 S. Ct. 1491 (1986) (citing Brouillette v. Board of Directors of Merged Area IX, 519 F. 2d 126 (8th Cir. 1975). Petitioner received none of these safeguards, but upon this application relies upon the denial of the first two criteria enumerated by the 8th Circuit.





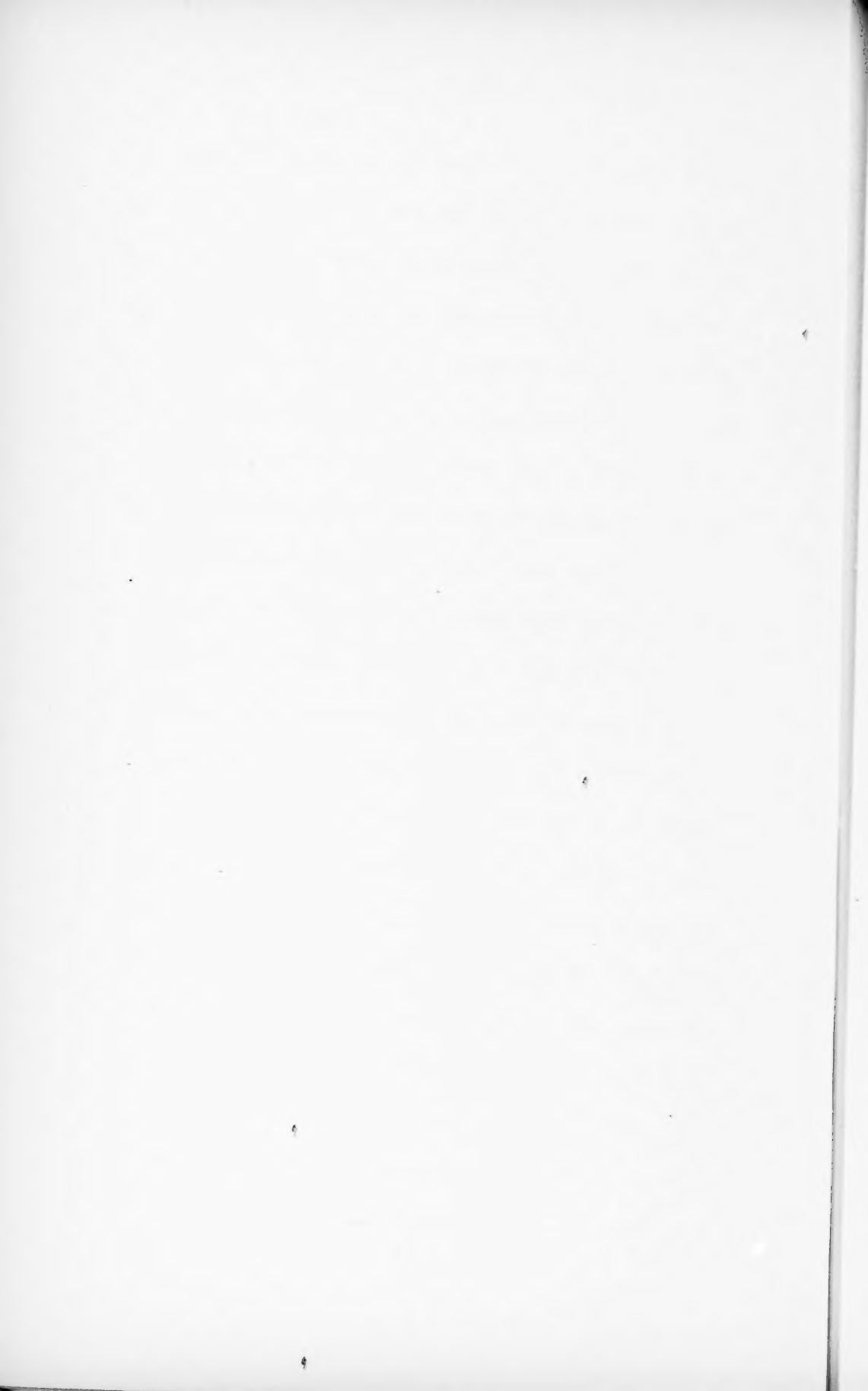
The singular significant federal examination of the New York judicial disciplinary procedure, which affects over 3,300 judges, was an omnibus attack on New York's then removal statute in the United States District Court for the Eastern District of New York (Sarisohn v. Appellate Division, Second Department, Supreme Court of the State of New York, 265 F. Supp. 455, 458 (E.D.N.Y. 1967)). At that time, New York's removal procedure provided for removal "for cause". The statute survived a constitutional challenge only by being interpreted to mean "for a cause enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to meet the charges". The present statute requires that a hearing be held only upon a formal complaint specifying the charges.

Under the judicial disciplinary



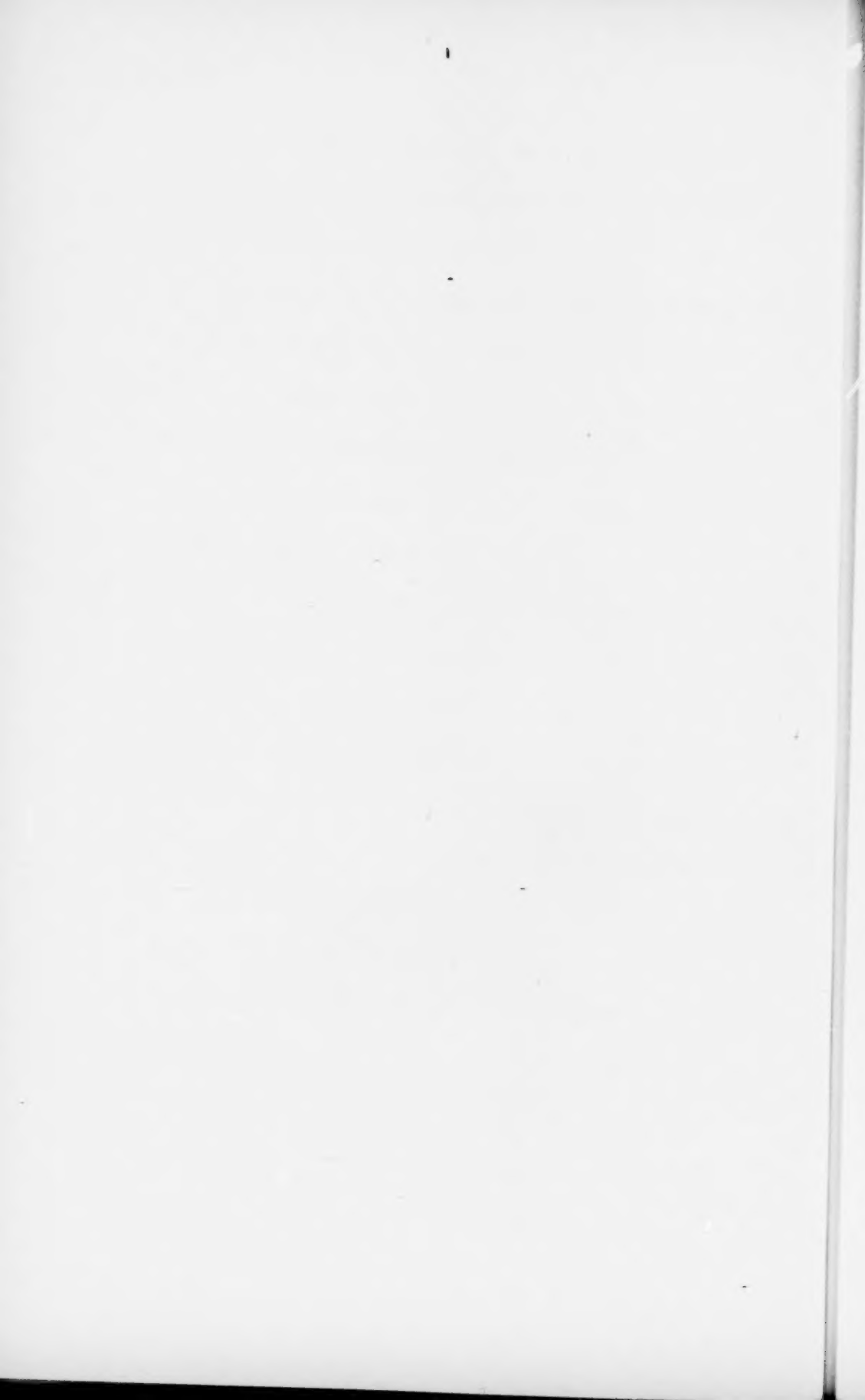
procedure that presently exists in New York, the New York Court of Appeals is the first and only judicial body involved in the judicial disciplinary procedure. It is the Court of first and last resort. It would be shockingly wrong to confer upon it the power to recklessly disregard the United States Constitution's guarantee of due process and leave an aggrieved party whose life has been destroyed by this action without any avenue for relief. Such a precedent would expose New York's approximately 3,300 judges to arbitrary removal from office and will severely impugn judicial independence by exposure to such risk. It would confer upon the Court of Appeals an arbitrary unconstitutional power over the tenure and lives of an entire class of aggrieved citizens.

It is incumbent upon this Court to clarify to the New York Court of



Appeals that the due process guaranteed by the United States Constitution is not a protection limited to the rights of murderers and rapists. It equally attaches to decent citizens who have substantial interests at stake.

The instant matter presents an exercise in judicial gymnastics by the Court of Appeals designed to not only deny due process, but to immunize the denial from any review. The federal due process issue was specifically raised. The New York Court of Appeals conceded that it was properly raised, and stated that it would disregard all the findings presented to it which were made in violation of petitioner's due process rights to be tried only on the conduct alleged in the complaint. However, the New York Court of Appeals then proceeded to make its own plenary findings which materially and substantially exceeded the conduct charged



in the complaint. It then utilized these findings as the foundation for affirming the sanction which the State Commission on Judicial Conduct had unconstitutionally arrived at by utilizing findings beyond the charges.

In effect, the New York Court of Appeals embraced and utilized the very same unconstitutional conduct for which it condemned the Commission on Judicial Conduct. While the transgressions of the Commission were reviewable by the Court of Appeals, the *ab initio* transgressions of the Court of Appeals are beyond review except by this Court.

In N.L.R.B. v. Homemaker Shops Inc., 724 F 2d 535, the 6th Circuit held that "[d]ue process requires that a party charged with unlawful conduct be given a 'meaningful opportunity to meet the complaint.'"

The conduct of the New York Court





of Appeals denied petitioner the opportunity to not only defend himself from the uncharged conduct, but even to argue against it. Before the Commission, petitioner knew what uncharged conduct the Referee had found and the extent to which this uncharged conduct was being advanced by the Commission's Counsel as a basis for removal. As to the uncharged conduct found by the Court of Appeals, petitioner had no way of surmising what wild speculations that Court would deduce from the record and utilize as a basis for removal.

By bunching uncharged conduct with charged conduct, the New York Court of Appeals has rendered its opinion fatally offensive to due process. The Court of Appeals in its opinion finds that the charged conduct, plus the uncharged conduct that it includes in its plenary findings, is sufficient to remove



petitioner from office. There is absolutely no way of discerning whether the charged conduct standing free of the profound prejudice of the more serious uncharged conduct would sustain such a draconian result as removal from office and lifetime exclusion from judicial office of a long-time respected and unusually competent jurist.

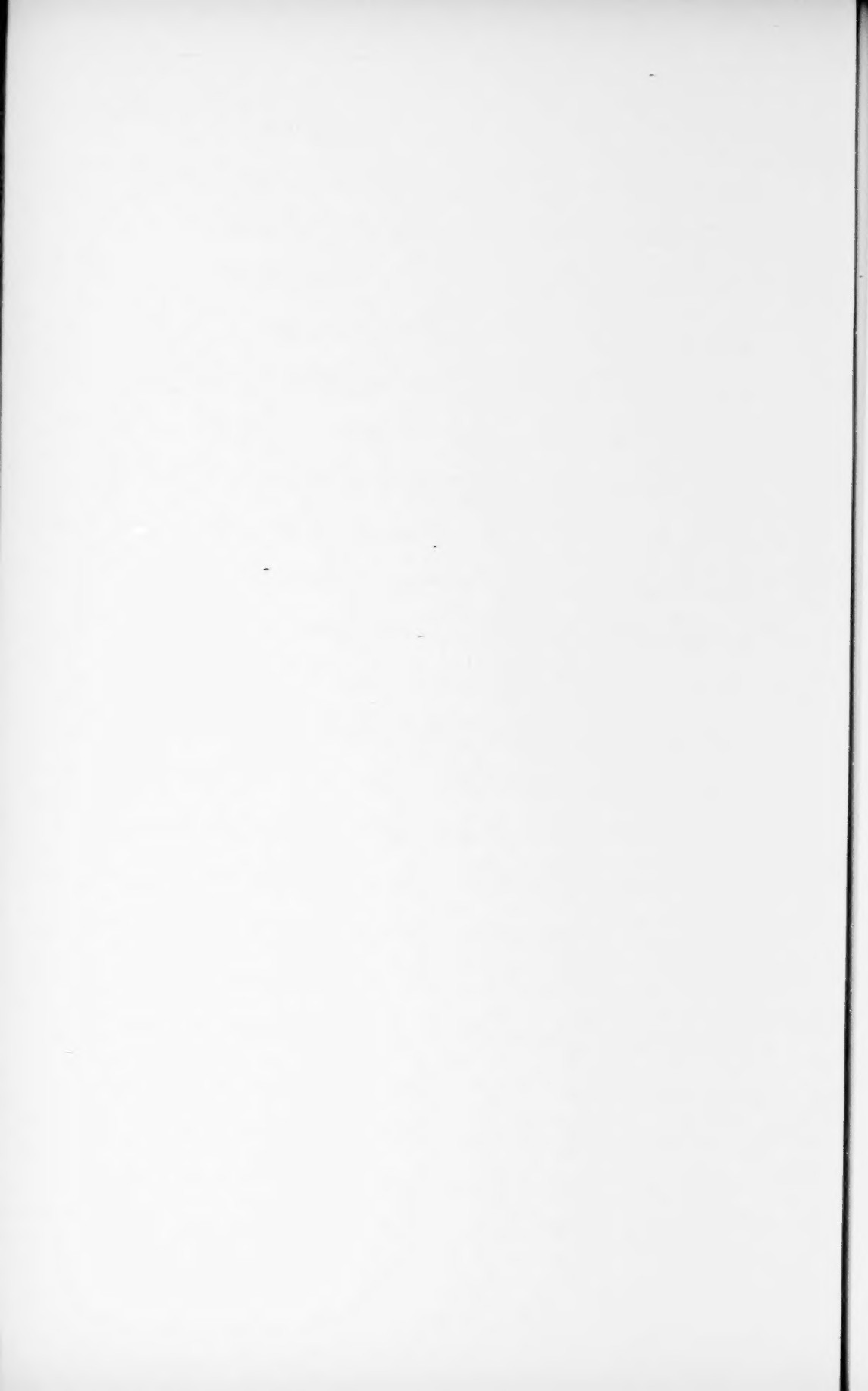
The Court of Appeals course is further unconstitutionally offensive because it completely disregards that the proceeding is poisoned beyond redemption once uncharged conduct is intermingled with the limited charges of a formal complaint. (In re: Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919) In the instant case the poisoning of the record is far from incidental. The uncharged conduct is graver than the charged conduct.

Additionally, the record



which the Court of Appeals utilized in determining the matter with its own plenary review, instead of remanding for a new hearing, was poisoned beyond redemption by extensive testimony, taken over objection, of a prejudicial and inflammatory nature that went beyond the charges. The Court of Appeals in its opinion expressly reflected the severe prejudicial nature of the testimony on this uncharged conduct when it referred to it as "often of a sensational nature". (A-44) Nevertheless, it also gave to its own opinion media flavor by quoting subject matter from the Commission's Determination that it claimed it was ignoring.

A mere reading of the Commission's Determination (A-6 to A-36) is sufficient to conclude the fatally prejudicial extent to which it is poisoned by extensive matter of an inflammatory nature that is extraneous to the charges. It reads like



an afternoon soap opera and is virtually a carbon copy of the Referee's Report which is virtually a carbon copy of the Commission's brief to the Referee.

The use of the uncharged conduct, even if it were not largely a product of malicious fantasies, as in fact it is, is fatal to the fair hearing that is fundamental to due process. The findings contained in the uncharged conduct contorts innocent isolated events into a literal diatribe of egregious acts that are then manipulated to give credence to issues of fact within the period of charged conduct. This goes to the very core of the entire proceeding and the unjust finding of lack of candor. It converts a case that involved a loss of temper in a very private aspect of petitioner's life, into uncharged impropriety in his official conduct. It perverts an isolated course of anger in





the break-up of a private adult consensual relationship into a prolonged history of petitioner taking on-going advantage of Ms. Gertel. What could be more prejudicial to the relatively limited charges in the complaint. It is difficult to conceive of what could be more prejudicial to the issues than going beyond the charges to create the false image of the older employer taking on-going advantage of his "innocent" young employee. This fantasy contains everything but the evil villain tying the innocent young maiden to the railroad tracks as the train approaches. Both the Commission's Determination and the Opinion of the Court of Appeals is no more than the creation of prejudicial smoke to conceal the absence of fire.

Every conceivable aspect of petitioner's personal and professional relationship with his former employee was fully



explored in the Commission investigation. If there were a basis for further charges beyond those set forth in the complaint, the Commission could have voted those charges. It did not, because there was no basis, and to include such findings in the Commission's Determination was a denial of due process and for the Court of Appeals to do its own post-hearing and post-argument journey into speculative, uncharged and undefended conduct was certainly an even more dastardly denial of due process.

Since fact questions are not germane to this application, petitioner will not delineate the extent to which the Determination is replete with products of malicious fantasy, arrived at by dissecting disjointed and often false tidbits out of context. Nor will petitioner review the further extent to which credible and documentary evidence adduced



by petitioner was ignored by the Referee almost to the extent that his report read like the product of an inquest in which the burden of proof was not on the Commission, but upon an absent accused.

What is germane to the instant application is the extreme extent to which the Opinion of the Court of Appeals departs from the perimeters of the complaint in a most prejudicial manner, a manner which clearly precluded a dispassionate view of the record as it related to the limited charges that were subject to the Court of Appeal's hasty review.

That this uncharged conduct was so inflammatory as to preclude any reasonable person from excluding it from their minds in reviewing the record is further evidenced by the opinion of the Court of Appeals itself. While it criticizes the taking and utilization of evidence of



uncharged conduct by the Referee and its use by the Commission, almost at the inception of its own opinion, it quotes some of the most horrendous, egregious and inflammatory findings of the Commission. This course could serve no purpose, except to give its opinion a flavor which would give a lay reader the impression that removal was justified. What it in fact establishes is that the Court of Appeals was profoundly influenced in its own fact finding by the findings in the Commission's Determination that exceeded the allegations of the complaint.

#### Conclusion

It is basic to a democratic society that there be some judicial avenue which would preclude a citizen from being deprived of a valuable property right without constitutional due process and its denial being subject to some judicial review. In this matter, the denial was ab



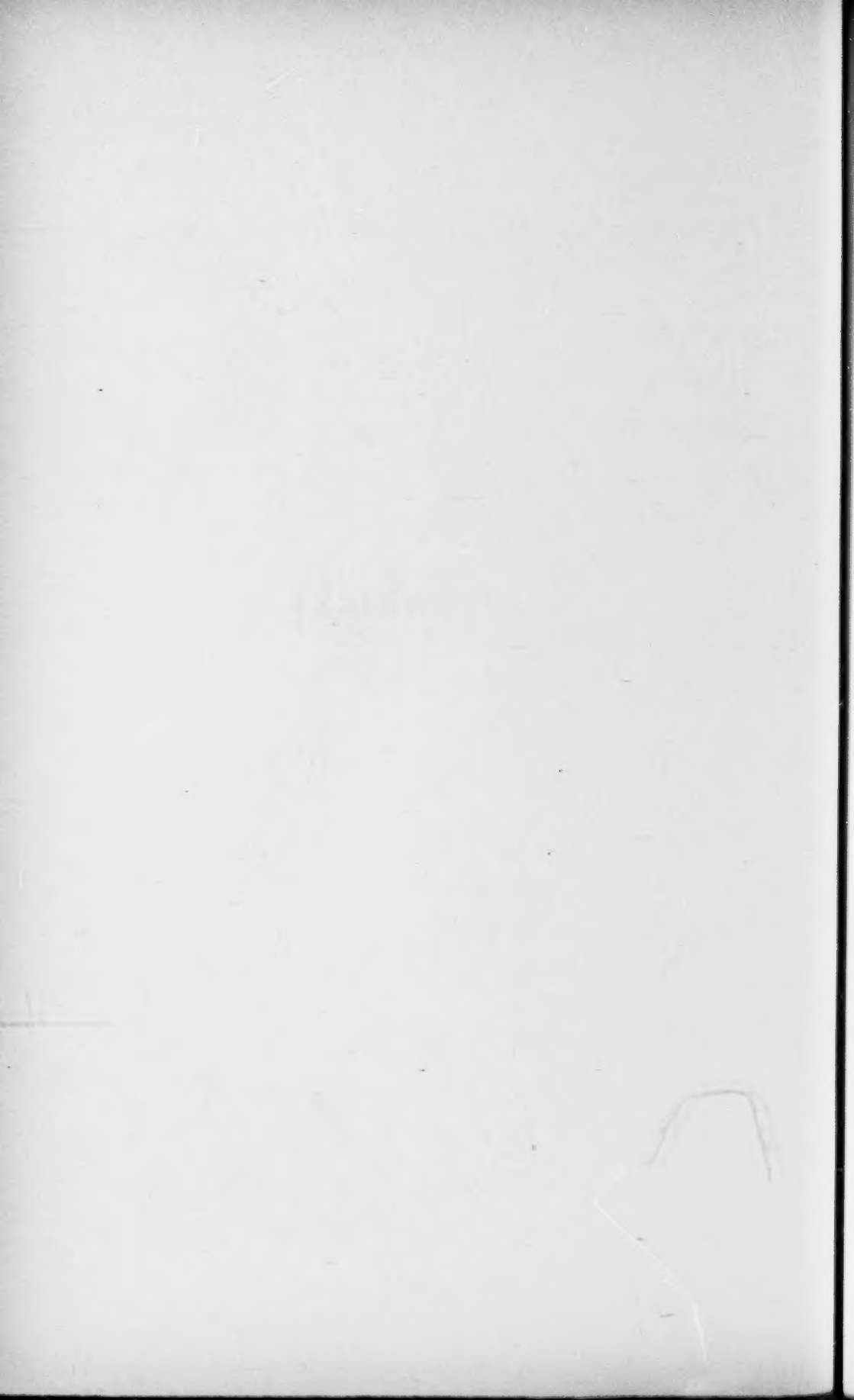


initio by the only court involved in the process. The magnitude of the deprivation is compounded when the property right is one intrinsic to the entire life of the aggrieved citizen. In the instant case this constitutes a sufficiently shocking wrong that sustains this Court assuming the burden of review. The alternative is to leave without remedy a shocking wrong by a court of original jurisdiction whose opinion is subject to no other review.

The necessity for review by this Court is substantially supported by the absence of any adequate state remedy or alternate federal remedy. Under the New York statutory procedure, the first and only court involved in judicial discipline is the New York State Court of Appeals. When it makes its own plenary findings, as it did in the instant case, in the absence of this Court granting certiorari, there is absolutely no review.



## APPENDICES



APPENDIX A

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding Pursuant  
to Section 44, subdivision 4, of the  
Judiciary Law in Relation to

BERTRAM R. GELFAND,

Surrogate, Bronx County.

-----

FORMAL WRITTEN COMPLAINT

1. Article VI, Section 22, of the  
Constitution of the State of New York  
establishes a Commission on Judicial  
Conduct (hereinafter "Commission"), and  
Section 44, subdivision 4, of the  
Judiciary Law empowers the Commission to  
direct that a Formal Written Complaint be  
drawn and served upon a judge.

2. The Commission has directed that  
a Formal Written Complaint be drawn and  
served upon Bertram R. Gelfand  
(hereinafter "respondent"), Surrogate of  
Bronx County.



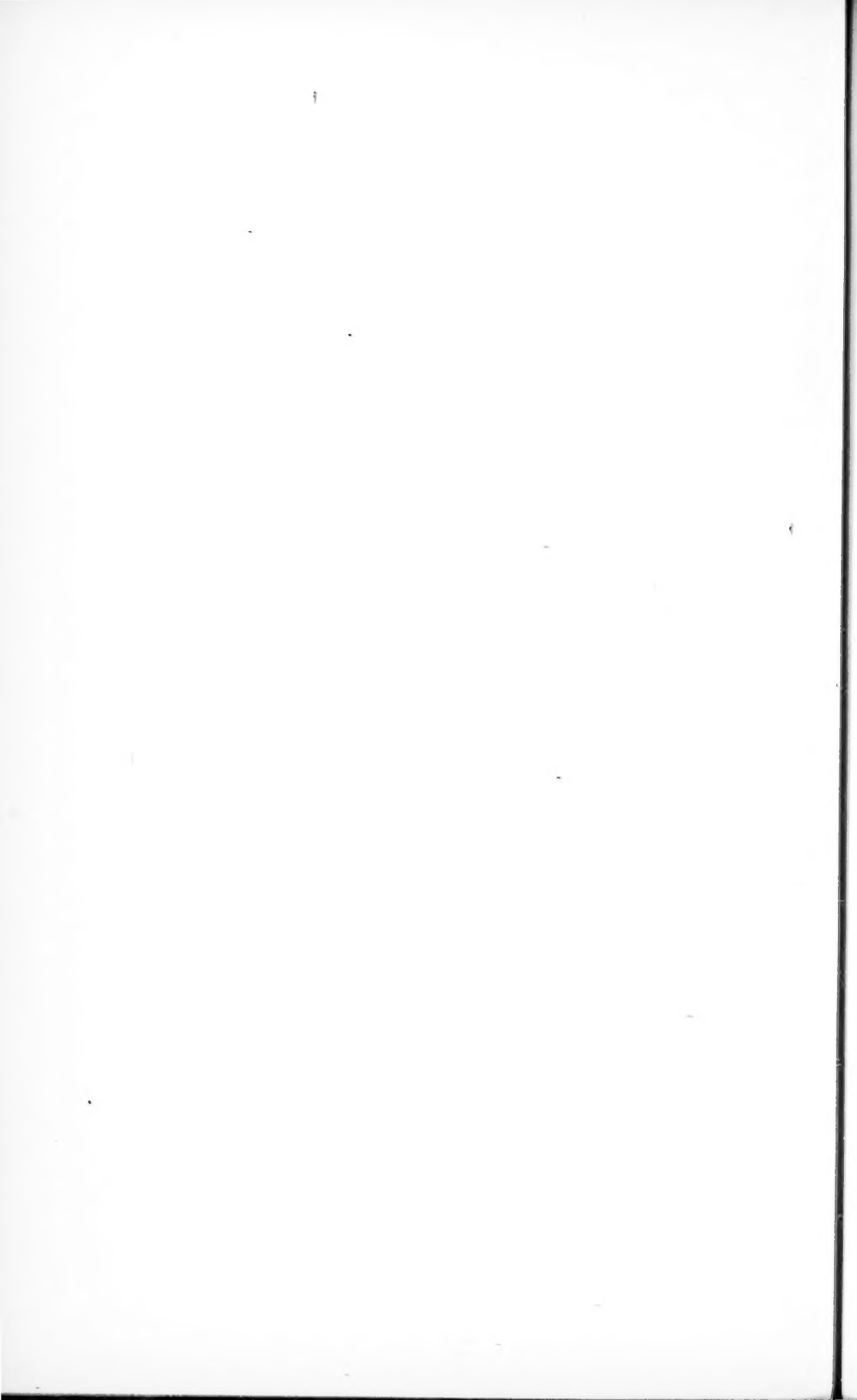
3. The factual allegations set forth in Charge I state acts of judicial misconduct by respondent in violation of the Rules Governing Judicial Conduct of the Rules of the Chief Administrator of the Courts (hereinafter "Rules Governing Judicial Conduct") and the Code of Judicial Conduct.

CHARGE I

4. From August 3, 1985, through December 31, 1985, in connection with his personal relationship with Irene Gertel, a law assistant on his staff from March 1978 to May 1984 and from September 1984 to September 10, 1985, respondent engaged in a course of misconduct, to wit:

(a) on August 3, 1985, respondent told Ms. Gertel she was "off the payroll" as of August 2, 1985, a statement made for personal reasons, unrelated to her official duties;

(b) on August 3, 1985, respondent





emptied Ms. Gertel's office of her personal effects and delivered them in boxes to Ms. Gertel's home for personal reasons, unrelated to her official duties;

(c) on or about August 3, 1985, to on or about September 17, 1985, respondent left obscene, annoying and otherwise offensive messages on Ms. Gertel's telephone answering machine;

(d) on or about August 4, 1985, respondent, in attempting to see Ms. Gertel at an apartment building in Riverdale to discuss personal matters, falsely identified himself to the doorman of that building as "Mike Lippman", who at the time was Ms. Gertel's attorney;

(e) in August 1985, respondent demanded to meet with, and then confronted, Steven Kessler about his relationship with Ms. Gertel, told Mr. Kessler that he knew the Bronx County District Attorney, who was Mr. Kessler's



employer, and threatened to speak to the District Attorney about Mr. Kessler's conduct;

(f) in August 1985, respondent left offensive messages on Steven Kessler's telephone answering machine, and in one such message respondent threatened to speak to Mr. Kessler's mother, who then served as Deputy Public Administrator in Bronx County, or to Mr. Kessler's father, to obtain Steven Kessler's permission for respondent to speak to Ms. Gertel.

(g) in or about late August or early September 1985, motivated by animus toward Ms. Gertel arising out of their personal relationship, respondent requested that New York State's Deputy Chief Administrative Judge, Milton Williams, view unfavorably any application for employment in the courts that Ms. Gertel might submit; and

(h) in early December 1985,



respondent met with Emanuel Kessler and Muriel Kessler, of the law firm of Kessler & Kessler, and indicated his displeasure at their having employed Ms. Gertel as an associate of their firm without first consulting him.

5. By reason of the foregoing, respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct.

WHEREFORE, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: New York, New York  
June 10, 1986

/s/

---

GERALD STERN  
Administrator of the State  
Commission on Judicial Conduct  
801 Second Avenue  
New York, New York 10017  
(212) 949-8860



APPENDIX B

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding Pursuant  
to Section 44, subdivision 4, of the  
Judiciary Law in Relation to

BERTRAM R. GELFAND,

Surrogate, Bronx County.

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DETERMINATION

THE COMMISSION:

Mrs. Gene Robb, Chairwoman  
John J. Bower, Esq.  
David Bromberg, Esq.  
Honorable Carmen Beauchamp Ciparick  
E. Garrett Cleary, Esq.  
Dolores DelBello  
Victor A. Kovner, Esq.  
Honorable William J. Ostrowski  
Honorable Isaac Rubin  
Honorable Felice K. Shea  
John J. Sheehy, Esq.

The respondent, Bertram R. Gelfand,  
judge of the Surrogate's Court, Bronx  
County, was served with a Formal Written  
Complaint dated June 20, 1986, alleging  
that he engaged in a course of misconduct  
in connection with a female law assistant



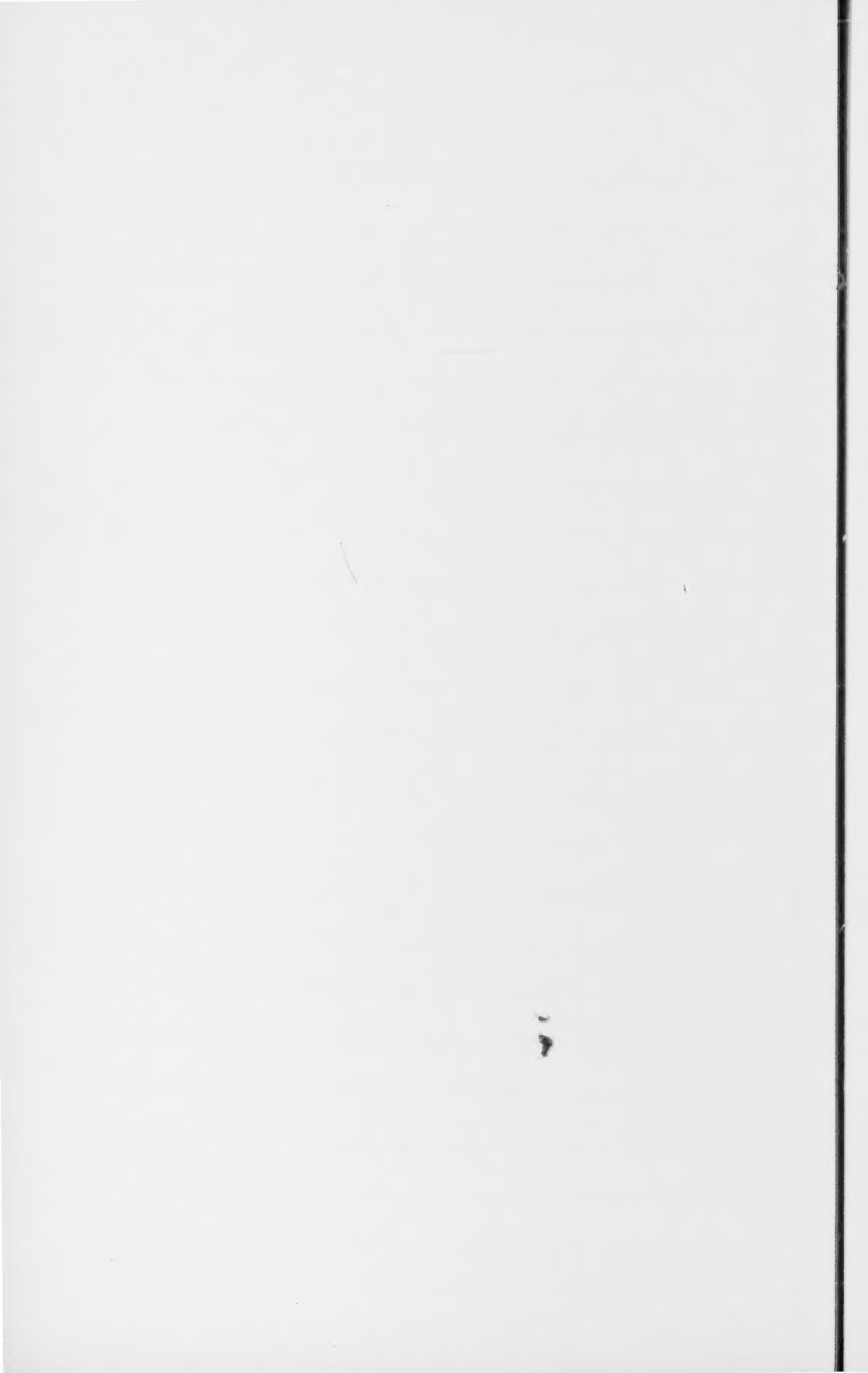


in his court. Respondent filed an answer dated July 28, 1986.

By order dated July 30, 1986, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 14, 15, 16, 17, and 21, 1986, and the referee filed his report with the Commission on December 31, 1986.

By motion dated January 2, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion on February 9, 1987. The administrator filed a reply on February 13, 1987.

On February 20, 1987, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.



1. Respondent is Surrogate of Bronx County and has been since January 1, 1973.

2. Irene Gertel was employed by respondent as a law assistant on his court staff from March 1978 to May 1984, and from September 1984 to September 10, 1985. From July to September 1984, Ms. Gertel worked as an attorney for the Mental Health Information Service.

3. Respondent and Ms. Gertel had a sexual relationship from September 1978 to August 2, 1985.

4. In December 1980, respondent was confronted about the sexual affair by Ms. Gertel's husband, who threatened to inform respondents's wife about the affair. Respondent told Ms. Gertel's husband that the affair was over.

5. In December 1980, respondent requested Ms. Gertel's resignation because of the problems her husband was causing as a result of the affair. Her husband



complained that Ms. Gertel's resignation had been requested for reasons other than merit.

6. In January 1981, respondent reconsidered his request for Ms. Gertel's resignation and allowed her to withdraw it. Shortly thereafter, sexual relations between respondent and Ms. Gertel resumed.

7. Ms. Gertel and her husband separated in March 1984.

8. In May 1984, respondent accused Ms. Gertel of having sexual relations with other men. Respondent requested and accepted Ms. Gertel's resignation because of his anger and jealousy over her purported affair with another man. Ms. Gertel resigned and subsequently went to work at the Mental Health Information Service ("MHIS").

9. The sexual relationship between respondent and Ms. Gertel continued during the period she worked at MHIS.



10. While she worked at MHIS, respondent accused Ms. Gertel of having an affair with a doctor with whom she worked.

11. In September 1984, respondent decided to rehire Ms. Gertel on a trial basis, over the objection of his chief law assistant.

12. In October 1984, respondent accompanied Ms. Gertel on a visit to her psychiatrist. Respondent told the psychiatrist that Ms. Gertel had been lying to the psychiatrist about her relationships with other men. Prior to visiting the psychiatrist, respondent drafted and had Ms. Gertel sign an agreement whereby she would be liable to him for \$100,000 if she revealed to anyone that he had accompanied her to the session.

13. On or about February 22, 1985, Ms. Gertel told respondent that she would be attending a weekend synagogue function





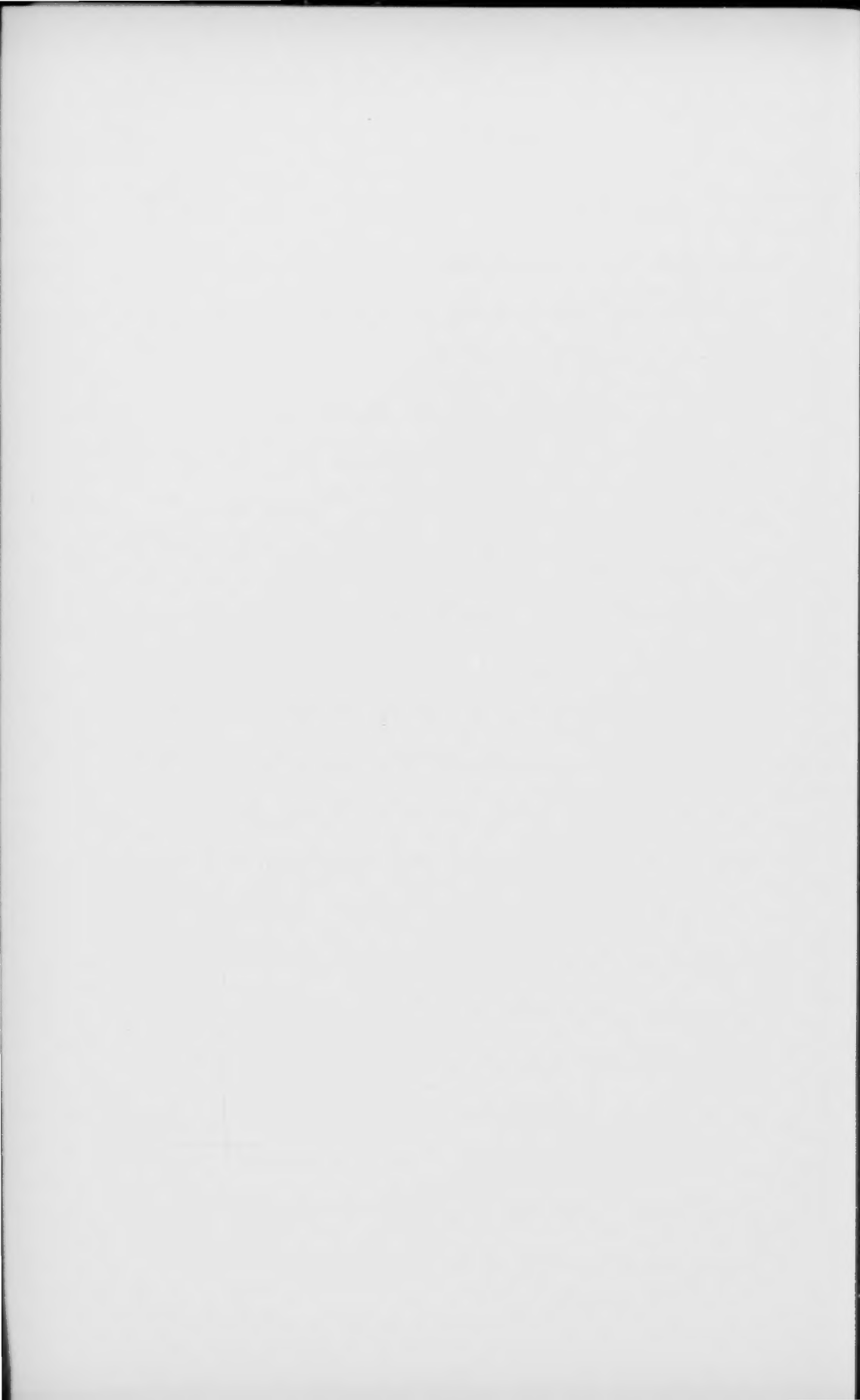
at a friend's home. Respondent did not want her to attend the function and accused her of "going on the hunt" for men.

14. Because of his anger and jealousy, respondent informed Ms. Gertel by letter dated February 22, 1985, that her employment with the court was terminated, although no date for leaving was set.

15. Ms. Gertel then wrote a letter to respondent pleading for reinstatement and declaring that she had "lost all desire to go away for the weekend."

16. Upon receiving Ms. Gertel's letter, respondent in effect withdrew his decision to terminate her employment by not fixing a specific date by which she must leave the court.

17. Following this incident, respondent and Ms. Gertel continued to have sexual relations.



18. During the weekend of July 19, 20 and 21, 1985, respondent learned that Ms. Gertel had been dating and having sexual relations with Steven Kessler, an assistant district attorney in Bronx County. Respondent confronted Ms. Gertel about this affair, and she confirmed it.

19. Because of jealousy, respondent immediately demanded Ms. Gertel's resignation by Monday, July 22, 1985.

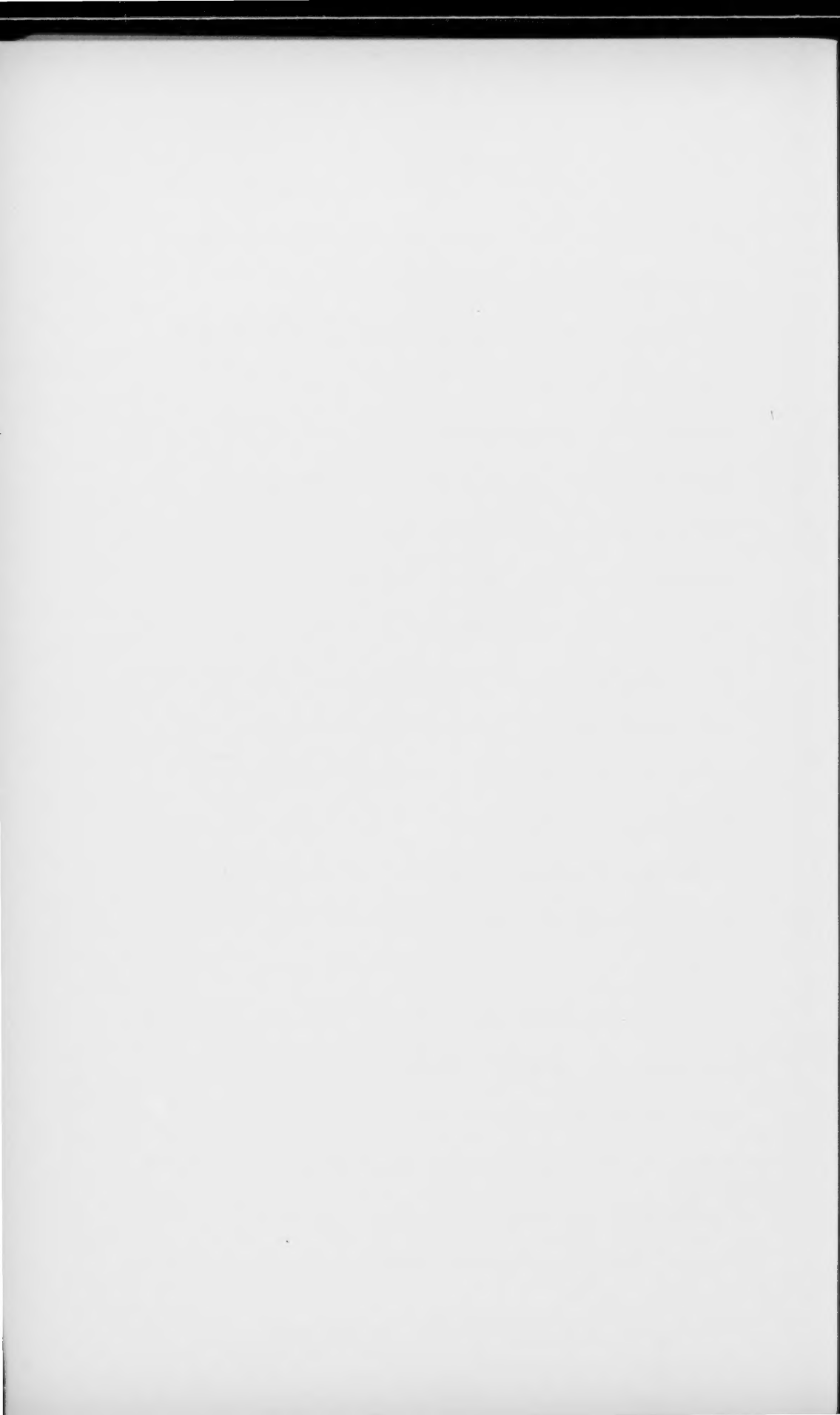
20. On July 22, 1985, Ms. Gertel submitted a letter of resignation to respondent but immediately requested permission to withdraw it. Respondent said that he would allow Ms. Gertel to withdraw her resignation, contingent upon her agreement not to date other men and upon her calling Steven Kessler to end their relationship. With respondent listening in on an extension, Ms. Gertel called Mr. Kessler from respondent's chambers and ended their relationship,



telling him that she had another lover, whom she did not identify.

21. On July 23, 1985, respondent summoned Ms. Gertel and Mr. Kessler to his chambers. Respondent told Mr. Kessler that he knew of his relationship with Ms. Gertel and repeatedly denigrated Ms. Gertel, calling her a "whore," a "slut," a "bitch" and "fucked up." Respondent said that while Ms. Gertel had been "screwing and fucking" Mr. Kessler, she had also been "screwing and fucking" another boyfriend. Respondent said that he knew that Mr. Kessler and Ms. Gertel had broken up and told Mr. Kessler to "stay away" from her.

22. From July 23 to August 2, 1985, respondent and Ms. Gertel frequently discussed her employment status. Respondent repeatedly demanded that, as a condition of remaining on his staff, Ms. Gertel make a "total commitment" to him in

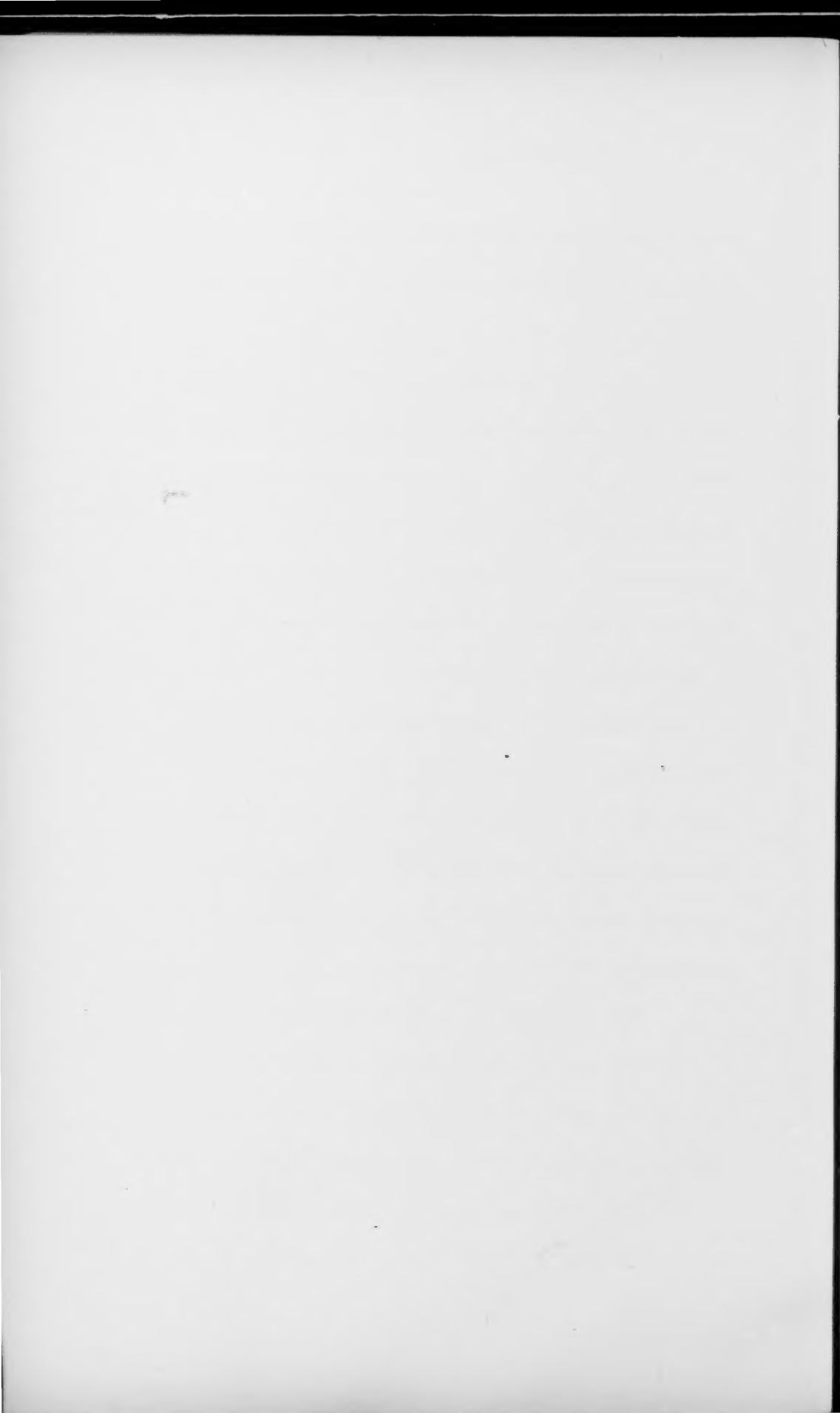


their personal and sexual relationship and that she not date Mr. Kessler or other men.

23. On August 2, 1985, respondent told Ms. Gertel not to report for work the following Monday or thereafter unless she was prepared to make the "total commitment" to him that he desired. Ms. Gertel asked him to reconsider, and respondent said he would. They then went to Ms. Gertel's home and had sexual relations. Later that day, they again discussed a "total commitment," and Ms. Gertel agreed to make it. Respondent agreed that Ms. Gertel could return to work the following Monday.

24. During the evening of August 2, 1985, respondent called Ms. Gertel at her home and asked whether she understood the commitment that she had made to him.

25. On August 3, 1985, at approximately 7:00 A.M., respondent called





Ms. Gertel's home, but there was no answer. After several more unanswered calls, respondent concluded that Ms. Gertel was with another man and became upset and jealous.

26. Respondent then began leaving obscene and annoying messages on Ms. Gertel's answering machine. He accused her of being "tied up with a customer," a "hypocritical liar" and a "bitch." He referred to Ms. Gertel's roommate as "the other whore you live with" and made vulgar references to oral sex and to "lies" from her "fucking lips."

27. Later on the morning of August 3, 1985, respondent left a message on Ms. Gertel's answering machine that she was "off the payroll, effective 5:00 P.M. Friday, August second," that she should "immediately mail in [her] parking permit and keys," and that she should not "show [her] face around this courthouse again."



Respondent made these statements out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

28. Later on August 3, 1985, respondent, accompanied by Ms. Gertel's attorney, Michael Lippman, an employee of the court, drove to the courthouse and entered Ms. Gertel's office. Respondent and Mr. Lippman took various personal items from Ms. Gertel's desk, cabinet and walls and put them into two boxes. They then drove to Ms. Gertel's home and left the boxes on her porch. In doing so, respondent acted out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

29. Throughout August 3 and 4, 1985, respondent left numerous messages on Ms. Gertel's answering machine, many of which were obscene, annoying and otherwise offensive.

30. In an attempt to reach Ms.



Gertel, respondent also left numerous offensive messages on Mr. Kessler's answering machine. One such call was made at about 2:30 A.M. on August 4, 1985. In another message, respondent threatened to go to Mr. Kessler's mother, Muriel, who was then the Deputy Public Administrator in the Bronx, an employee of respondent, in order to get to speak with Ms. Gertel.

31. Respondent, or Mr. Lippman at respondent's request, also placed calls to Ms. Gertel's roommate, her roommate's father, a friend, Ms. Gertel's brother and Mr. Kessler's grandmother in attempts to reach Ms. Gertel.

32. On Sunday, August 4, 1985, respondent and Mr. Lippman drove to Mr. Kessler's apartment building in search of Ms. Gertel. Respondent approached the doorman at Mr. Kessler's apartment building and identified himself as "Mike Lippman" in an attempt to reach Ms. Gertel



at Mr. Kessler's apartment.

33. Later in the evening of Sunday, August 4, 1985, respondent confronted Ms. Gertel outside Mr. Kessler's apartment building, and the two of them walked around the neighborhood and talked. Ms. Gertel complained about having been abruptly taken off the payroll and asked to be allowed to remain until September 4, 1985. Respondent said that he would put her on sick leave and allow her to stay until September 4.

34. Ms. Gertel told respondent in early August 1985 not to call her. Nonetheless, respondent left 30 obscene, annoying and otherwise offensive messages on her answering machine between August 3 and 5, 1985, and 39 additional obscene, annoying and otherwise offensive messages between August 5 and September 17, 1985.

35. On August 9, 1985, respondent appeared at Mr. Kessler's apartment





building in an attempt to see Ms. Gertel. Mr. Kessler refused to allow respondent to enter his apartment but agreed to meet respondent in the lobby of the building. The two men then walked around the neighborhood. Respondent repeatedly asked personal questions about Mr. Kessler's relationship with Ms. Gertel. Respondent several times mentioned the name of Bronx County District Attorney Mario Merola and reminded Mr. Kessler to tell the truth because he was an assistant district attorney. After Mr. Kessler returned to his apartment, respondent twice called him on the building intercom, demanding to be let into the apartment and insisting that Ms. Gertel was in the apartment. When Mr. Kessler again refused to let respondent in, respondent threatened to speak with Mr. Merola. Respondent said that he would tell Mr. Merola that Mr. Kessler was "harboring" Ms. Gertel and that he should



be fired from his job.

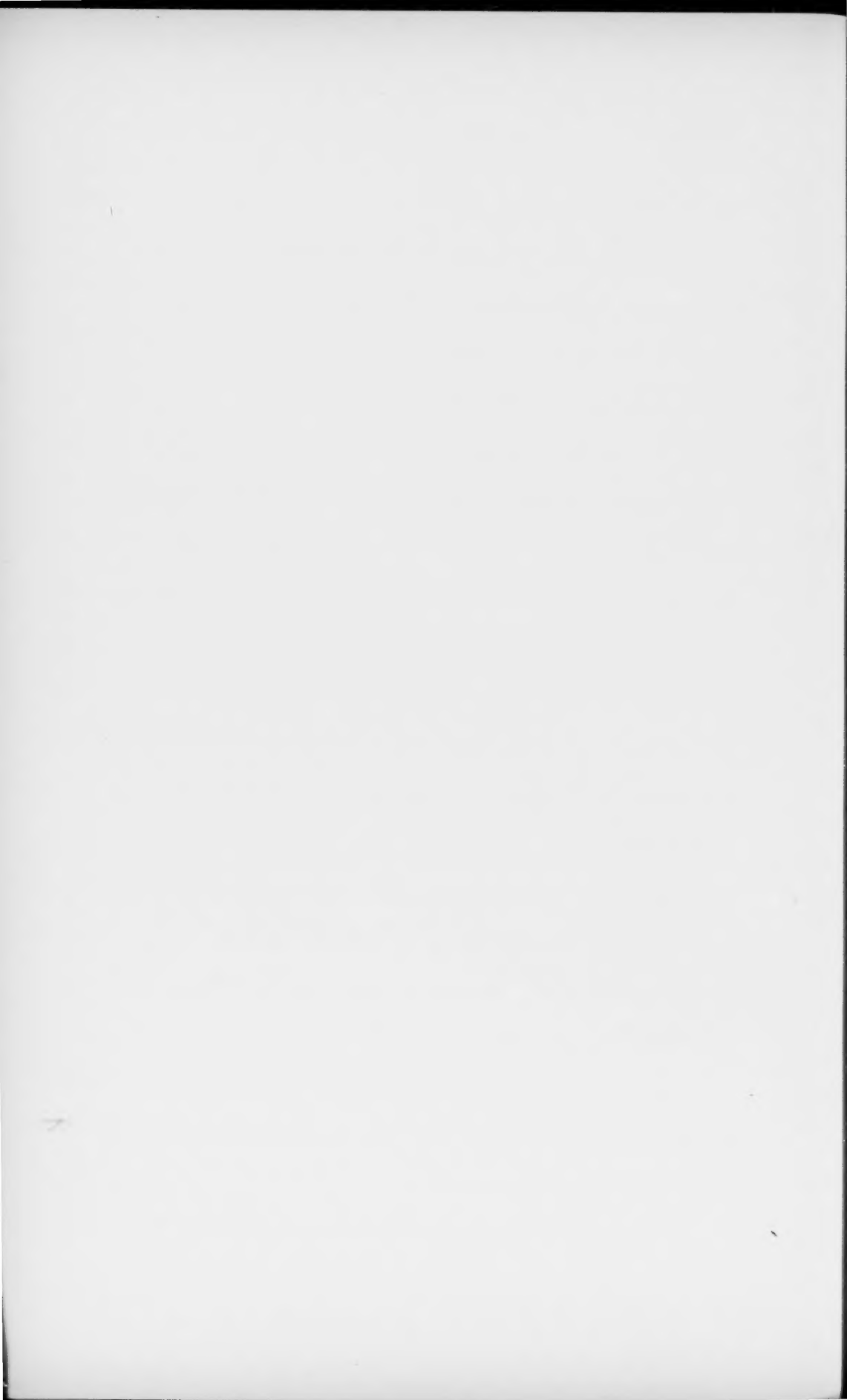
36. After his conversation with Mr. Kessler, respondent did meet with Mr. Merola to discuss Mr. Kessler's relationship with Ms. Gertel.

37. In late August or early September, respondent called Deputy Chief Administrative Judge Milton L. Williams, who supervises all trial courts, including respondent's, in New York City. The hiring of all lawyers and nonjudicial personnel in the New York City court system is subject to Judge Williams' approval.

38. Respondent asked Judge Williams to view unfavorably any application for employment in the court system by Ms. Gertel.

39. On October 10, 1985, respondent made a second call to Judge Williams to discuss Ms. Gertel.

40. In December 1985, Ms. Gertel



was hired as an associate in the law office of Emanuel Kessler, the father of Steven Kessler and the husband of Muriel Kessler, who at the time was Deputy Public Administrator in the Bronx.

41. Upon learning of Ms. Gertel's new employment, respondent summoned Mrs. Kessler to his chambers to ask why he had not been consulted prior to Ms. Gertel's hiring. With Mrs. Kessler before him, respondent called Emanuel Kessler by telephone. Emanuel Kessler suggested that they discuss the matter in person.

42. Emanuel Kessler subsequently met with respondent in respondent's chambers for about 45 minutes. Respondent denigrated Ms. Gertel and indicated his surprise that the Kesslers had hired her without consulting him. Respondent also told Emanuel Kessler that Mrs. Kessler's work in the court was "marginally effective."



43. Respondent's judgment as to each of his actions was affected by his personal relationship with Ms. Gertel. His conduct conveyed the unmistakable appearance that he was acting out of jealousy and not on the basis of merit.

44. Respondent lacked candor when he testified in this proceeding:

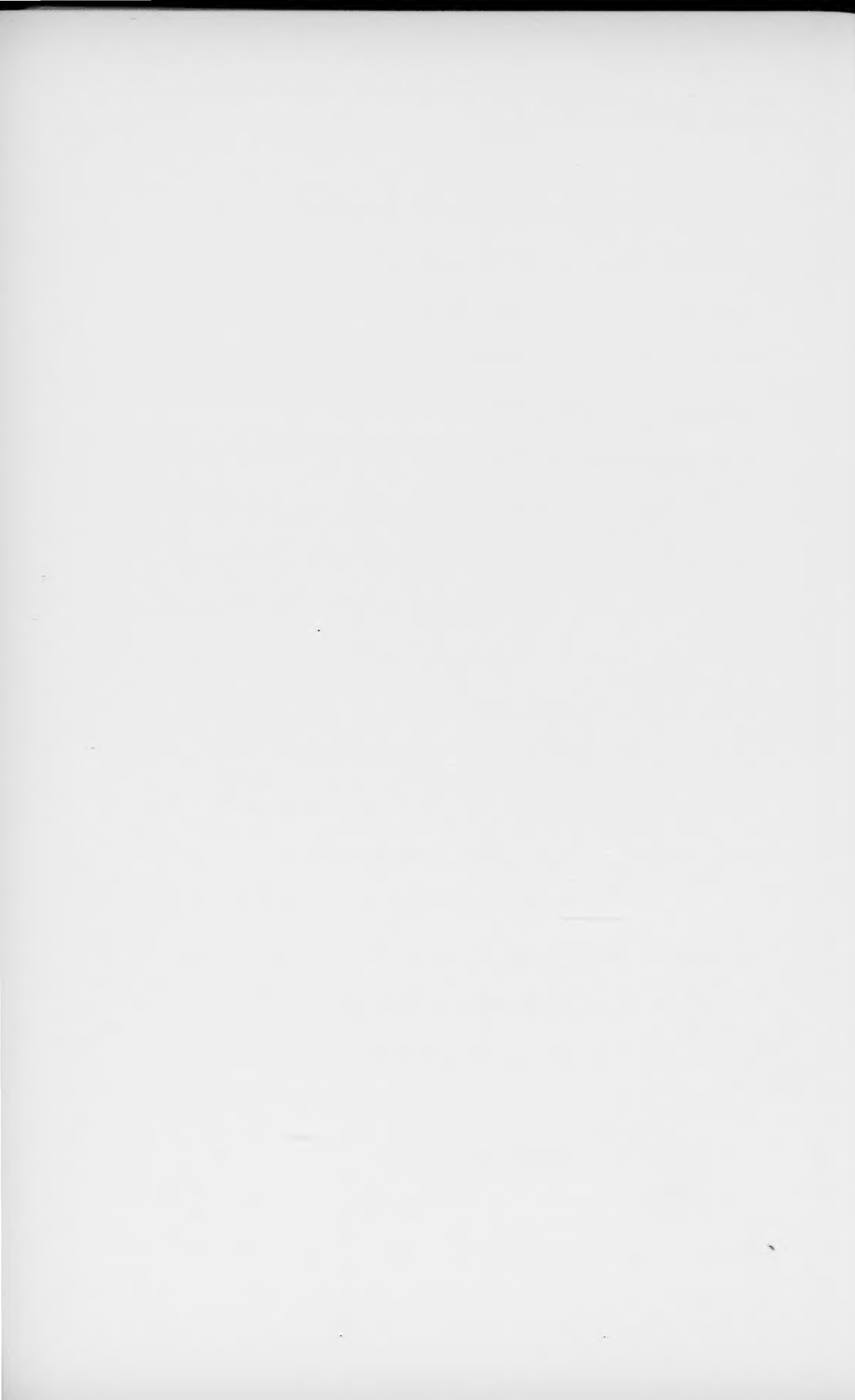
a) that he requested Ms. Gertel's resignation in December 1980 because her work was inadequate;

b) that his request for Ms. Gertel's resignation in May 1984 was because her work was inadequate;

c) that he decided to terminate Ms. Gertel's employment on February 22, 1985, because her work was inadequate;

d) That he demanded Ms. Gertel's resignation on July 22, 1985, because her work was inadequate;

e) that a meeting on July 23, 1985, with respondent, Ms. Gertel and Steven





Kessler never took place;

f) that he never made a telephone call to Mr. Kessler at 2:30 A.M. on August 4, 1985;

g) that he never approached a doorman and gave a false identity in an attempt to gain entrance to the building;

h) that he did not call Steven Kessler on August 9, 1985, and threaten to have him fired from his job;

i) that he did not attempt to keep Ms. Gertel from obtaining other employment in the court system;

j) that he did not initiate a meeting with Emanuel Kessler in December 1985 and express displeasure that he had not consulted with respondent before hiring Ms. Gertel; and,

k) that at all times he kept separate his personal and professional relationships with Ms. Gertel.

Upon the foregoing findings of fact,



the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The gravamen of this proceeding is not the fact that respondent had become involved in an extra-marital relationship. However, it is evident from this record that respondent, for a period of years, based staffing decisions in his court on reasons other than merit in order to further his own interests in maintaining a personal relationship with a court employee. Such repeated abuse of judicial authority constitutes serious misconduct. Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397 (1980); Matter of Steinberg v. State Commission on

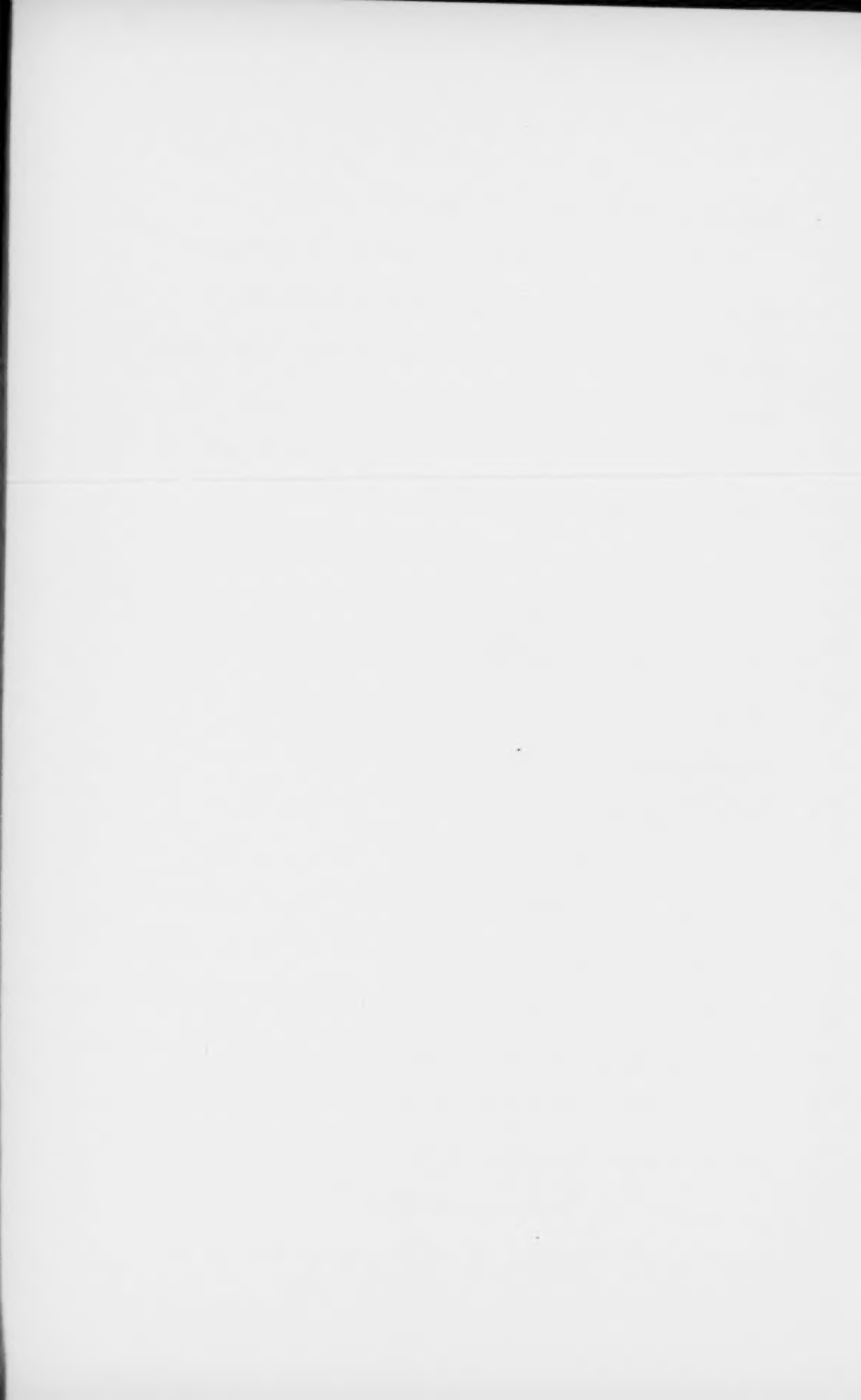


Judicial Conduct, 51 NY2d 74 (1980).

Six times in five years, respondent decided to hire or fire a law assistant not because of the quality of her work but because he was trying to control her personal life and force her to meet his personal demands for fidelity. On one of these occasions, respondent decided to re-hire her over the objections of his chief law assistant. Such decisions could not have been made without a demoralizing effect on other staff and a deleterious effect on the operation of the court.

Respondent's raid on the law assistant's office, numerous annoying and obscene telephone calls, confrontations with the law assistant's friends, use of a false identity and attempts to impair her future employment deviated significantly from the high standards of conduct expected of judges, on and off the bench.

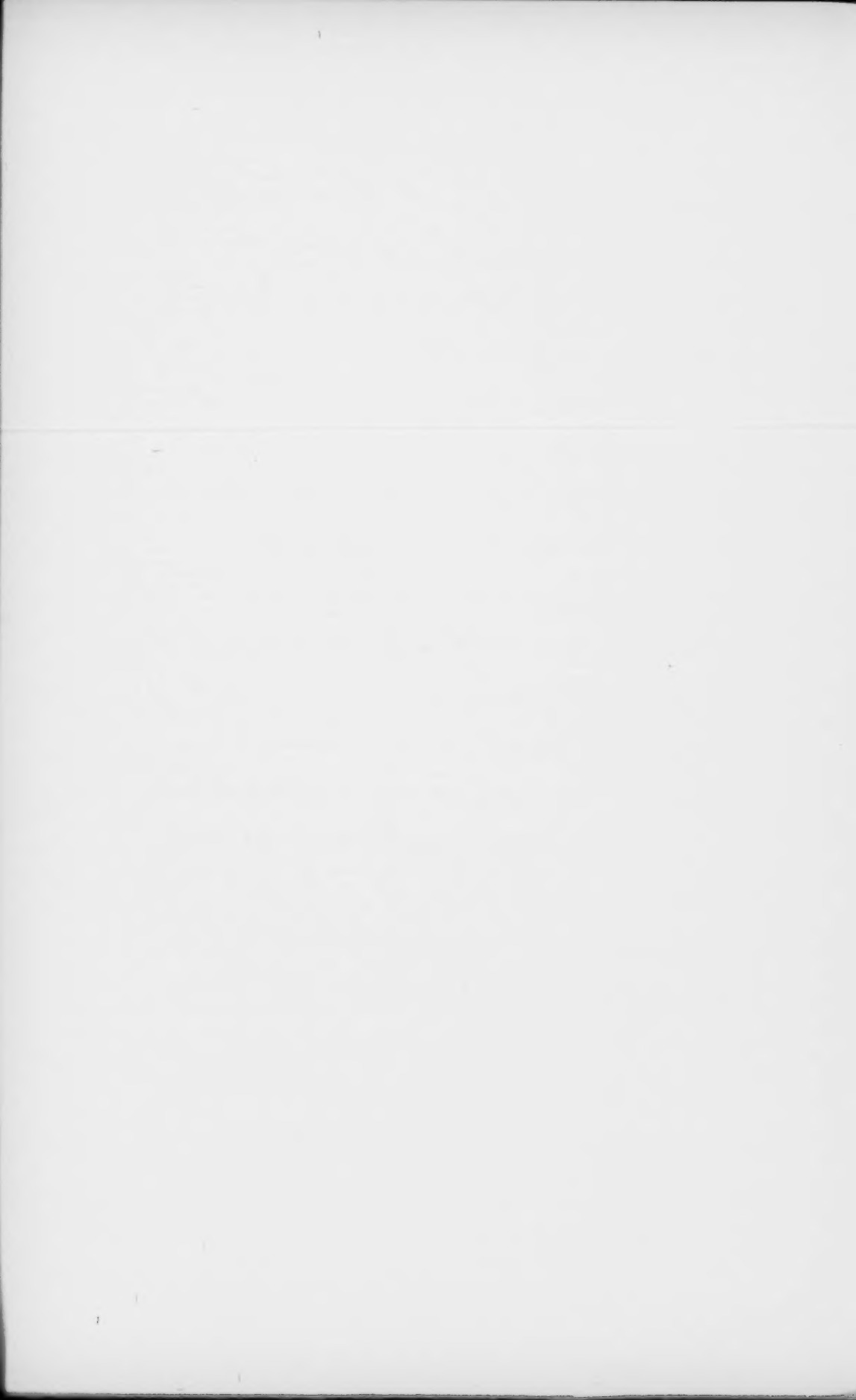
Matter of Kuehnel v. State Commission on



Judicial Conduct, 49 NY2d 465 (1980);  
Matter of Steinberg, supra; Matter of  
Cerbone v. State Commission on Judicial  
Conduct, 61 NY2d 93 (1984).

Respondent compounded his misconduct by his repeated lack of candor in this proceeding. As the distinguished referee concluded, "Respondent lacked candor in this proceeding as to most material issues. His testimony was frequently evasive, inconsistent and, in many respects, incredible." Such deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550 (1986); Steinberg, supra at 78 [fn]. The giving of false testimony is inexcusable and destructive of a judge's usefulness on the bench. Matter of Perry, 53 AD2d 882 (2d Dept. 1976).

It is uncontroverted that





respondent's reputation as a judge is superior. However, as the Court of Appeals noted in Matter of Shilling, supra at 399:

A Judge whose conduct off the Bench demonstrates a blatant lack not only of judgment but also of judicial temperament and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.

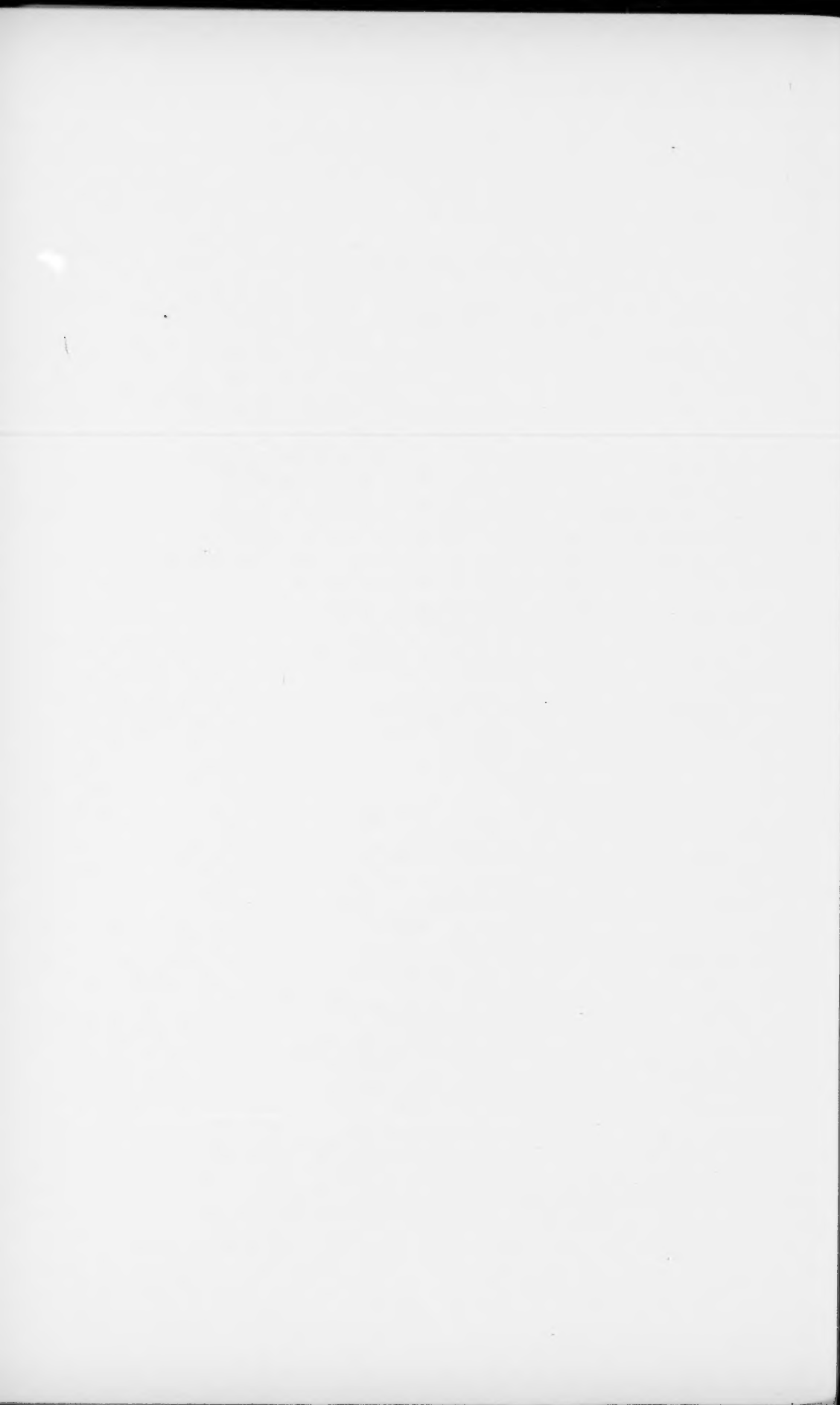
By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

Mrs. Robb, Mr. Bromberg, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Rubin, Judge Shea and Mr. Sheehy concur.

Mr. Bower concurs in a separate opinion.

#### CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing



the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: March 20, 1987

/s/ \_\_\_\_\_  
Lillemor T. Robb, Chairwoman  
New York State  
Commission on Judicial Conduct

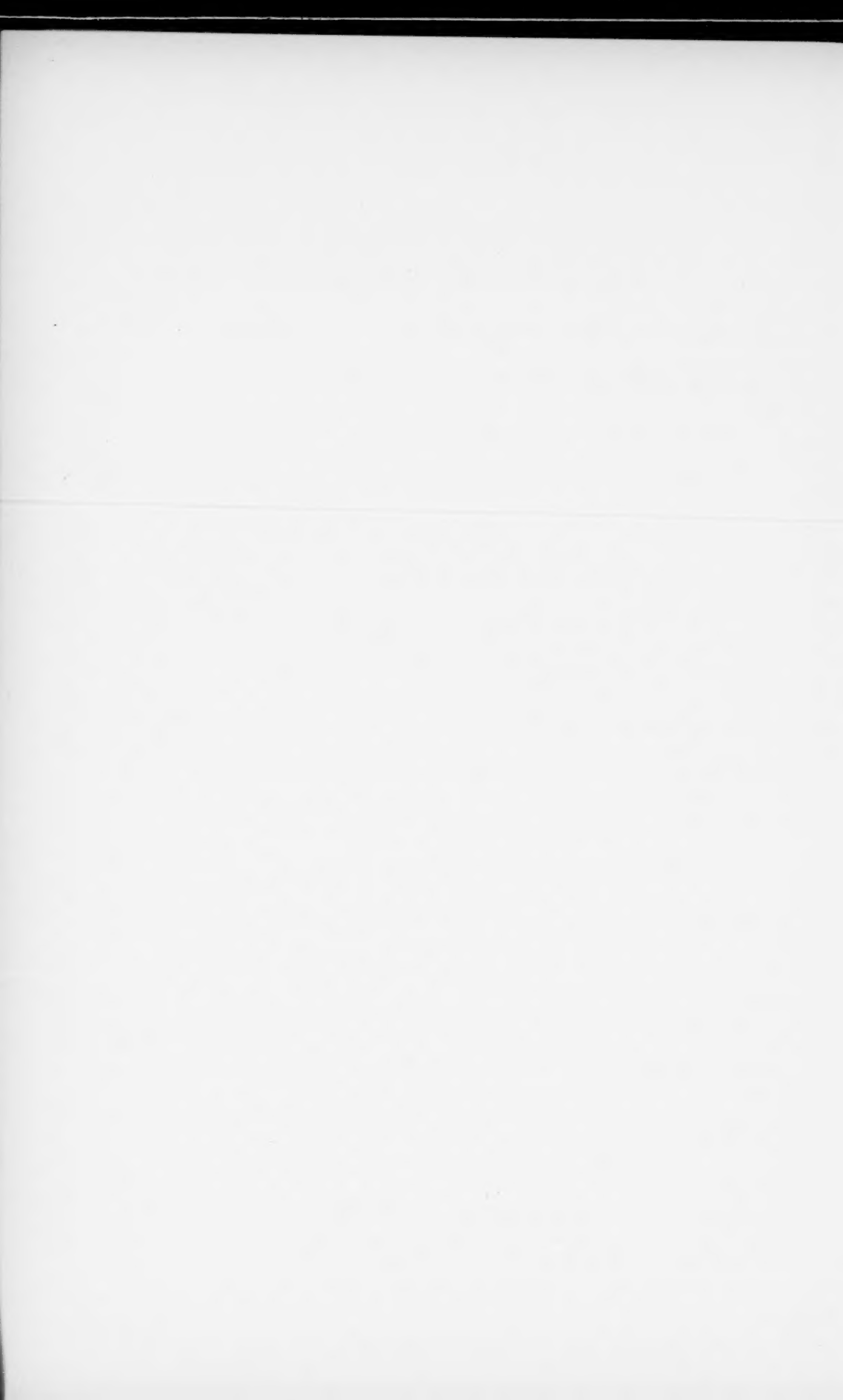


CONCURRING OPINION BY MR. BOWER

I concur in the finding of misconduct and the sanction of removal. I write separately only because I should like to emphasize my reasons for imposing the most severe sanction available in the case of a highly respected and competent judge.

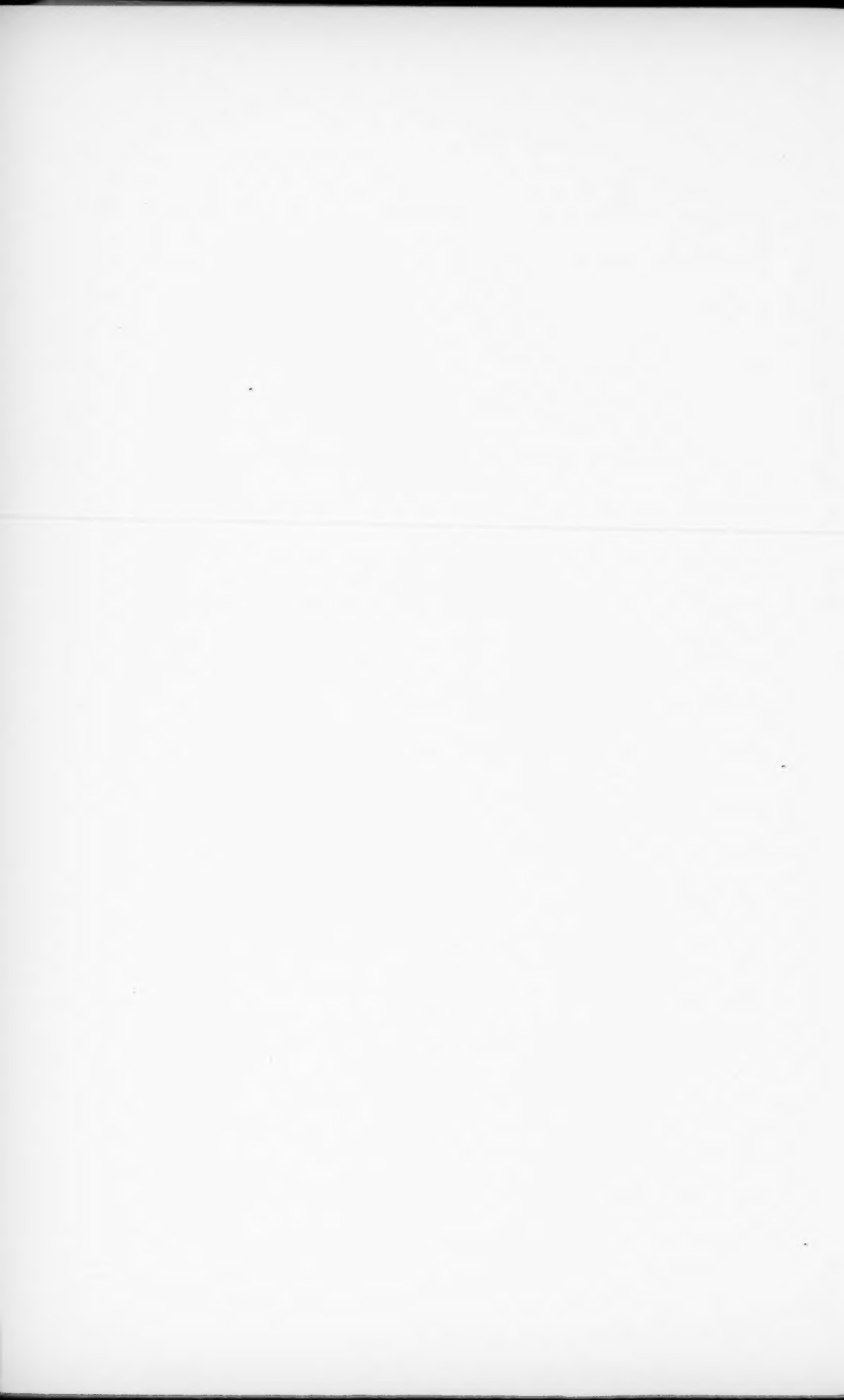
There are aspects of our personal lives that should not be a matter of public scrutiny. Some of the underlying charges against respondent and their origins fall in this area. If we start with the premise that the right of an individual to privacy is more than illusory, we must be careful in considering the borders of that privacy and limit our inquiry at some reasonable point where we do not violate them.

Given the nature and length of the relationship between respondent and Ms. Gertel, the language used, either in



person or on the telephone, discussions of intimate matters, commentary on others who might threaten the relationship, fall, in my opinion, within the ambit of an area protected by the right to privacy. I do not consider myself, or for that matter, any of my colleagues on the Commission, as having the duty to impose our sense of morality or good taste on the behavior at issue. Similarly, given the intense emotional atmosphere that pervaded the history of the relationship, just how far each party to it went to protect his or her imagined pride or feelings is a matter of judgment and taste which, in my opinion, is not for this Commission to oversee.

I perceive two important issues that are germane. First, was there a true abuse of judicial and administrative power by the respondent? Second, once the proceedings were begun, did he satisfy the





standards of candor expected of a judge?

Turning to the first issue, I am willing to distinguish some of the facts which the learned Referee found. For instance, I think that under the peculiar circumstances that existed between respondent, a married man, and Ms. Gertel, initially a married woman, we must pay some heed to the emotion-charged expectations or demands that each one made on the other. Each disappointed the other. This provoked reactions in respondent that can only be described as pathetic. His demanding her resignation repeatedly, his attempts to prolong a cooling relationship, his trying to break up what he perceived as her budding romance with another, all fall within that highly personal, private and emotion-charged area. So do the repeated annoying, lengthy and pathetic telephone calls. Of course, becoming a judge



doesn't mean that one ceases being human, and respondent's behavior was pathetically human. Even when carried to the preposterous limits of respondent's actions, it still comes within the ambit of essentially private behavior.

What constitutes the true misconduct in this regard are the clear attempts by respondent to damage Ms. Gertel after the end of the relationship. His direct attempt to prevent her re-employment in the court system and his interference with her employment in the private sector are nothing but vindictive venting of his spleen. They are truly bilious misuses of judicial and administrative power. His calls to Judge Williams and his talks with Mr. Kessler cannot be justified. This behavior is judicial misconduct. Of course, while serious, it would not be sufficient ground for removal. It is the second issue facing the Commission which



is far more troubling than the first.

When the Commission started an investigation based upon Ms. Gertel's complaints, the respondent gave false and misleading information and testimony in the following material respects:

(a) He testified repeatedly that on the four separate occasions that he demanded Ms. Gertel's resignation, he did so only because he was dissatisfied with her competence and work performance;

(b) He testified that a meeting with Ms. Gertel and Mr. Kessler on July 23, 1985 never took place;

(c) He testified that at all times, he kept his personal and professional relationships with Ms. Gertel separate and his requests for her resignation were not for personal reasons;

(d) He testified that he did not make certain telephone calls at 2:30 A.M. when, in fact, he did;



(e) He testified that an incident involving his giving a false name to a doorman at an apartment house, never took place;

(f) he testified that he did not call Ms. Gertel's friend on the building intercom and did not threaten to have him fired from his job;

(g) He testified that the circumstances of the meeting between him and Mr. Kessler at the apartment house did not come about as alleged by Mr. Kessler;

(h) He testified that he did not request Judge Willaims to treat Ms. Gertel's application for future employment in the court system unfavorably; and,

(i) He testified that he did not initiate a meeting with Ms. Gertel's subsequent employer and did not express displeasure at the fact that she had been hired by him.

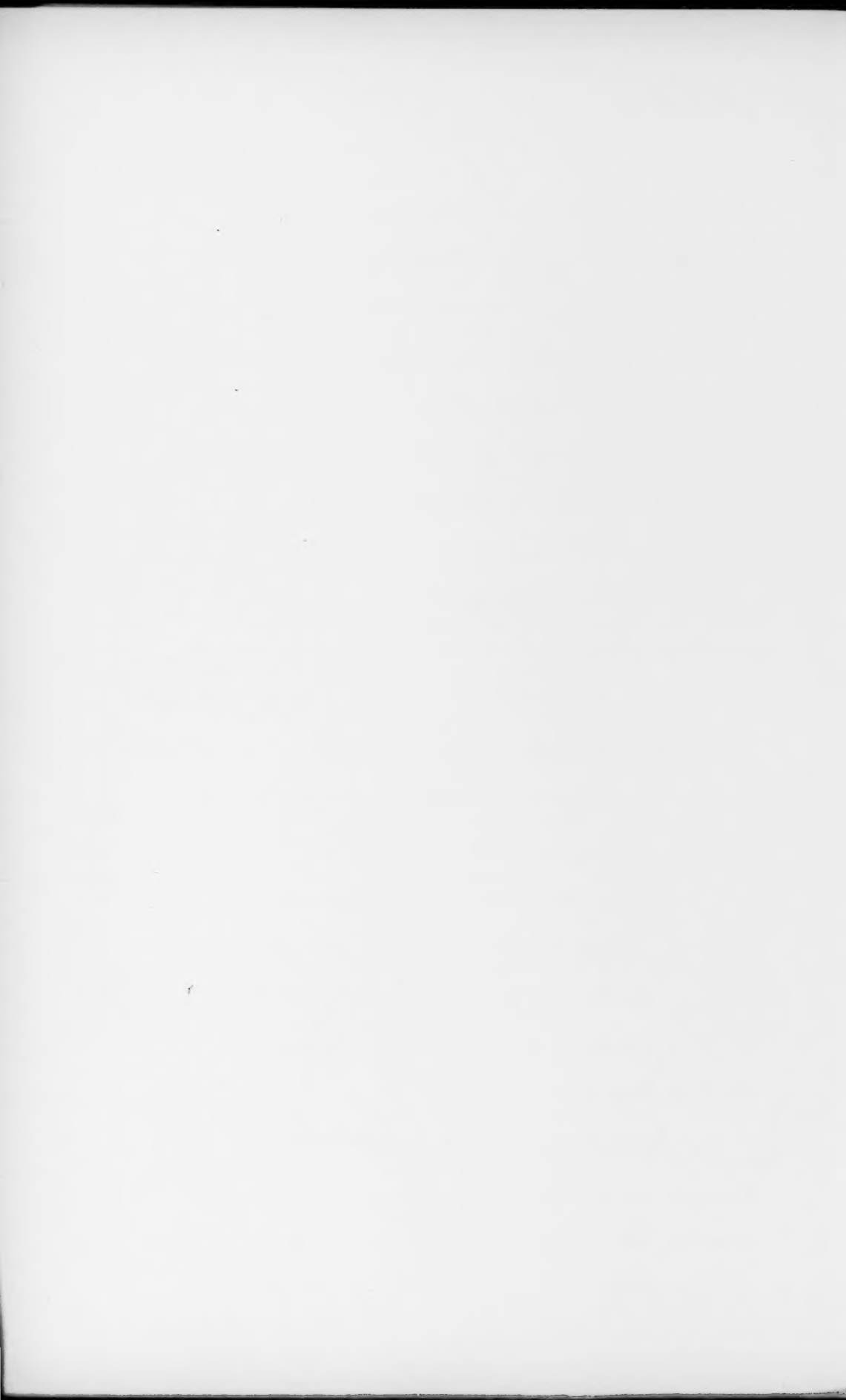
The above partial litany of





misstatements convinced the learned Referee to conclude that the respondent lacked candor as to most material issues and his testimony was frequently evasive, inconsistent and in many respects, incredible. Even if one could find that the underlying course of conduct, private or otherwise, was highly improper but not sufficient for removal, his subsequent lack of candor is totally opposed to the role of a judge who is sworn to uphold the law and seek the truth. The office of judge required respondent to cooperate in the investigation of the charges against him. Cooperation not only implies but requires truth and candor. The giving of false testimony not only is inexcusable but is destructive of a judge's usefulness on the Bench.

Respondent submitted numerous character references and encomiums from highly placed, reputable sources. It is



uncontroverted that his reputation as a judge has been superior. However, I weigh his conduct during these proceedings even more severely because of his superior intellect and find that his deviations from the truth are even more serious.

Respondent's emphasis on his emotion-charged and stressful period, bordering on irrational behavior in 1985, has no bearing on the issue of his utter lack of candor. He simply decided to "stonewall" the charges without being able to bestow internal logic on his story. His conduct during these proceedings bespeaks a willful attempt to pervert the truth. It is this which leads me to the inescapable conclusion that respondent has forfeited his right to remain on the Bench.

Dated: March 20, 1987

/s/

---

John J. Bower, Esq., Member  
New York State  
Commission on Judicial Conduct



SCJC No. 183  
In the Matter of the Honorable Bertram R.  
Gelfand, Surrogate, Bronx County,

For Review of a Determination of State  
Commission on Judicial Conduct,

## OPINION

Petitioner has served as Surrogate of Bronx County since January 1, 1973. It is uncontested that prior to the disclosure of the events that are the subject of this proceeding, he was a respected member of the judiciary of our State. The evidence before us indicates, however, that his removal from office is warranted because of his misconduct between August 3, 1985 and December 31, 1985 and his subsequent lack of candor

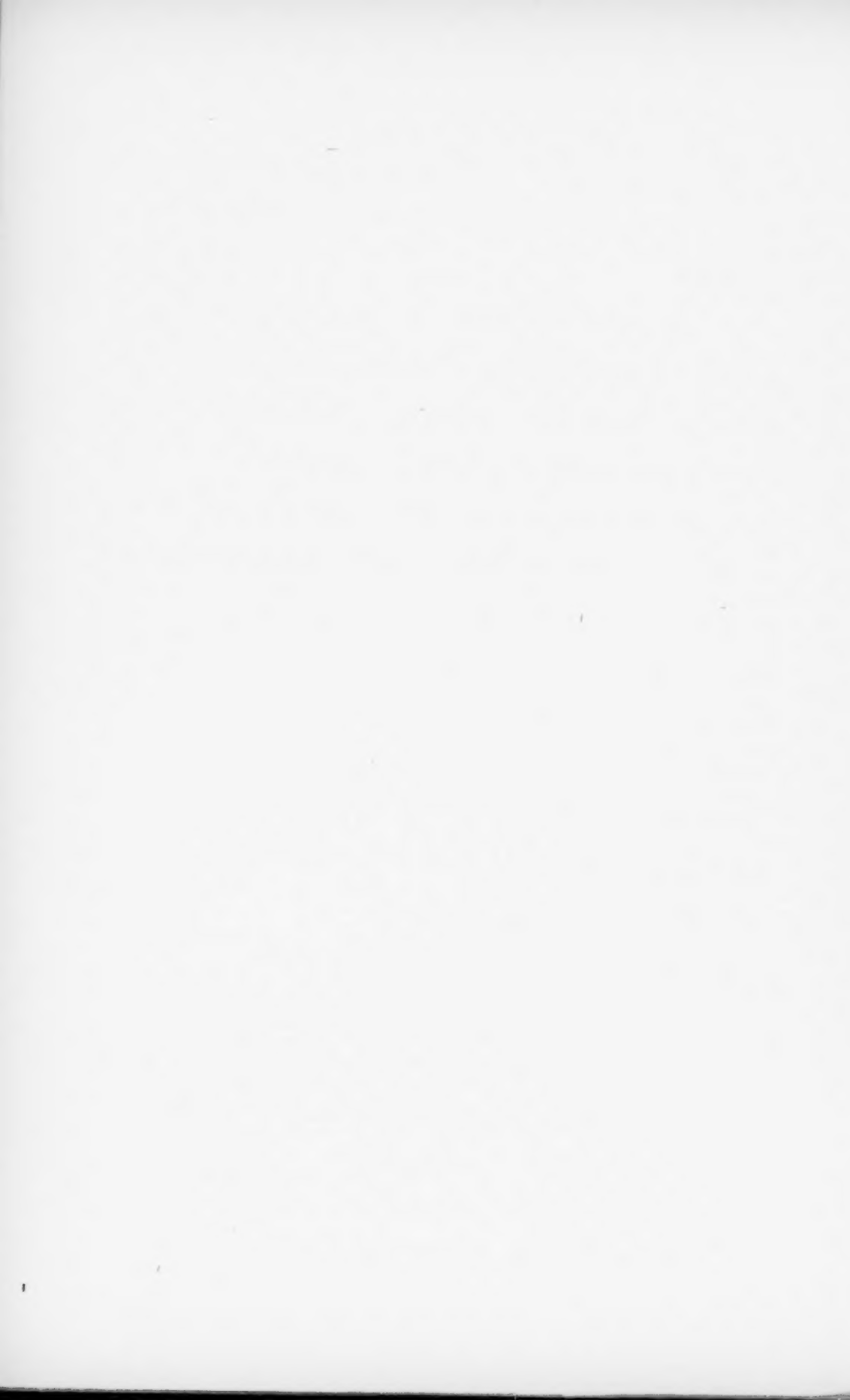


with the State Commission on Judicial Conduct.

On June 20, 1986, at respondent's behest, respondent's administrator issued a formal complaint charging petitioner with eight separate acts of judicial misconduct during the period from August 3, 1985 to December 31, 1985. Each of the allegations involved acts by the Judge motivated by animus toward a former law assistant because of a personal and sexual relationship between them. (Footnote restating paragraph 1. of the formal complaint omitted since complaint appears in its entirety as Appendix A.)

Petitioner admitted the relationship existed while the law assistant worked for him, but denied the material portions of the allegations of misconduct. The matter was referred for a hearing.

The evidence showed that, for a period of several years, petitioner had





engaged in an extramarital affair with one of his law assistants. In addition to sustaining all of the charges in the formal complaint and finding that petitioner lacked candor as to nearly all of the material facts in the proceeding, the referee found that petitioner had misused his position throughout the entire course of the affair to prolong the relationship. The Commission determined that petitioner engaged in a course of misconduct throughout the duration of the relationship and lacked candor at the hearing and that the sanction of removal was appropriate. We review the determination upon petitioner's request (Judiciary Law Section 44 [7] and [91]).

Upon full factual review of the evidence adduced before the referee (NY Cons art 6, Section 22 [d]; Judiciary Law Section 44 [9]), we conclude that, during the period of August 3, 1985 to December



31, 1985, petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue their affair. On August 3, 1985, petitioner fired the law assistant based on events in their personal relationship. Shortly thereafter, he emptied her office desk and left the contents on the doorstep of her residence. At that time, petitioner made more than 60 telephone calls -- leaving annoying and obscene messages -- but the law assistant apparently had resolved neither to return his calls nor to pursue the relationship. In a desperate effort to reach her, he falsely identified himself to a doorman as her attorney on



one occasion and on another threatened to speak to her boyfriend's parents if the boyfriend would not allow petitioner to speak to her. Petitioner confronted the boyfriend, accused him of "harboring" the law assistant and threatened to speak to his employer, the Bronx District District Attorney, to have him fired if he did not reveal the whereabouts of the law assistant. At the end of August or in early September, 1985, petitioner called the Deputy Chief Administrative Judge and asked him to view unfavorably any application that the law assistant might submit for a position in the court system. Finally, in early December, 1985, petitioner met with the law assistant's new employer -- her boyfriend's father. The father was an attorney, a social acquaintance of petitioner and the husband of an employee in petitioner's court. Petitioner remonstrated with the father



because he had hired the law assistant without first consulting him. This highly improper conduct was compounded further by petitioner's lack of candor during the course of these proceedings with respect to both the motivation underlying his actions, just described, and many background incidents introduced by either petitioner or the Commission, including testimony that was evasive, incredible and false.

We conclude that this conduct constituted inexcusable violations of sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct.

Petitioner's repeated misuse of his judicial powers and his subsequent failure to be candid in this proceeding were in conflict with the standards of integrity and propriety required of members of the judiciary, and inimical to his role as a judge





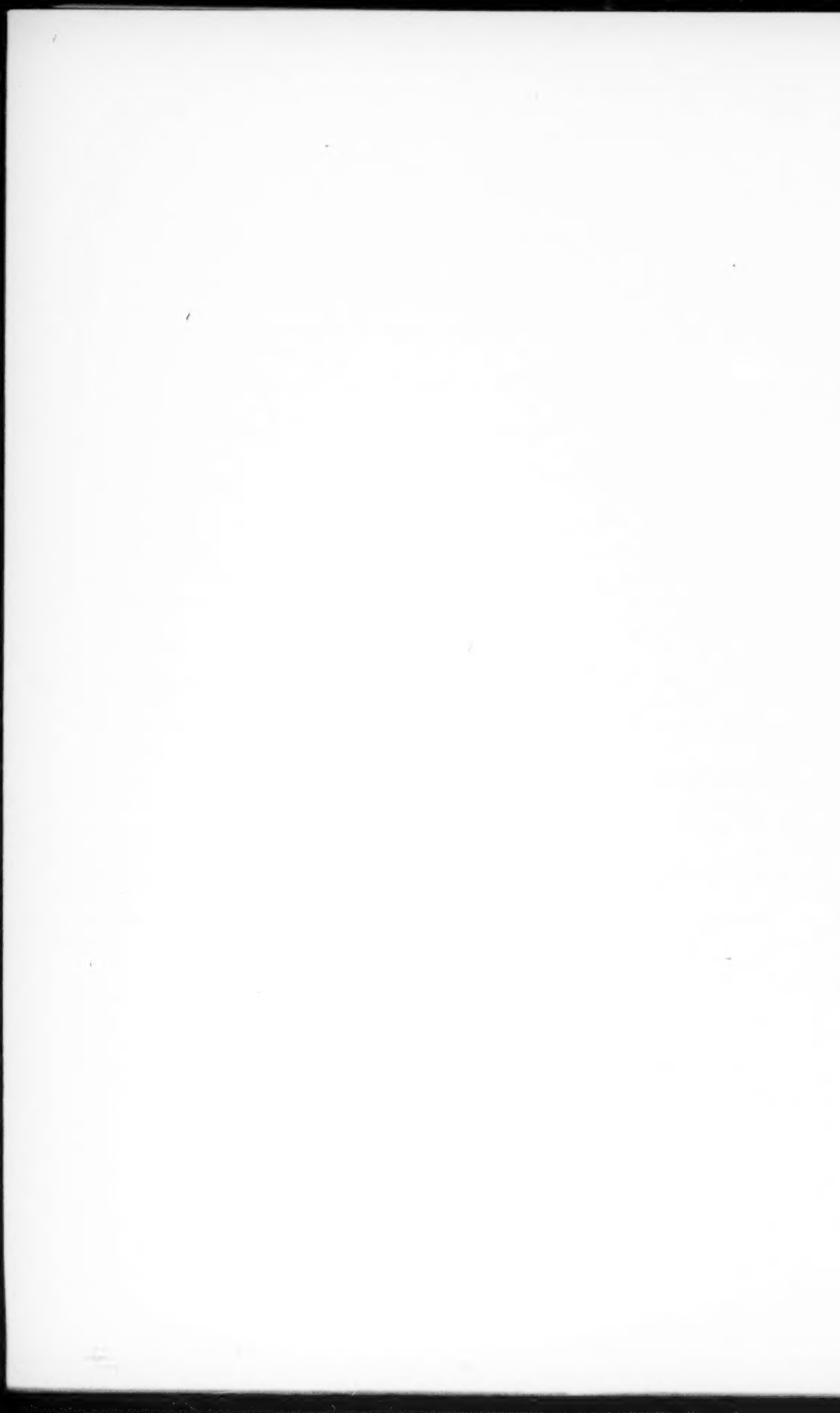
(Canon 1 of the Code of Judicial Conduct; see, Matter of Myers, 67 NY2d 550, 554).

By allowing his personal relationships to influence both his judgement and the administration of the court over which he presides he could not help but impair public confidence in his integrity and impartiality. (Canon 2 of the Code of Judicial Conduct; Matter of Sims, 61 NY2d 349, 359). The effectiveness of the judicial system is dependent upon the public's trust and violations such as these which undermine that trust are so contrary to the ethical obligations required of judges in conducting their personal and judicial duties that removal is essential (see Matter of Aldrich v State Comm., 58 NY2d 279, 283; Matter of Shilling, 51 NY2d 397, 402; Matter of Kuehnel, 49 NY2d 465, 469).

We draw these conclusions, however, without regard to any misconduct that may



have occurred prior to the time period described in the formal complaint served upon petitioner. While the referee may have allowed relevant evidence of event predating the alleged misconduct in order to clarify or to provide background for the formal charges, the complaint did not charge petitioner with misconduct prior to August 1985. Accordingly, it was unnecessary and indeed improper for the commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature -- which preceded the dates covered by the complaint or to consider such conduct in its determination of sanction. Indeed, the Commission's responsibility to safeguard the public's trust in the judiciary by both shielding innocent judges from unjust charges and exposing and disciplining those who have abused their



office is not fulfilled where uncharged conduct forms the basis of its published determination. Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds (Matter of Murray v Murphy, 24 NY2d 150, 157; see, Matter of Seiffert, 65 NY2d 278, 280). Because of our power to review the facts in cases involving judicial misconduct (NY Cons art 6, Section 22 [d]; Judiciary Law Section 44 [91], however, a new hearing is unnecessary. We conclude that the acts that were described in the formal complaint and proven at the hearing constitute sufficient cause for removal.

For the foregoing reasons, the determined sanction of removal is accepted, without costs.

\* \* \* \* \*

Determined sanction accepted, without



costs, and Bertram R. Gelfand is removed from his office of Surrogate, Bronx County, effective immediately. Opinion Per Curiam. Judges Simons, Kaye, Alexander, Titone and Hancock concur. Chief Judge Wachtler and Judge Bellacosa took no part.

Decided July 2, 1987

No. 87-736

Supreme Court, U.S.  
FILED

NOV 13 1987

JOSEPH E. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1987

HONORABLE BERTRAM R. GELFAND,  
Surrogate, Bronx County,

*Petitioner,*

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT IN OPPOSITION**

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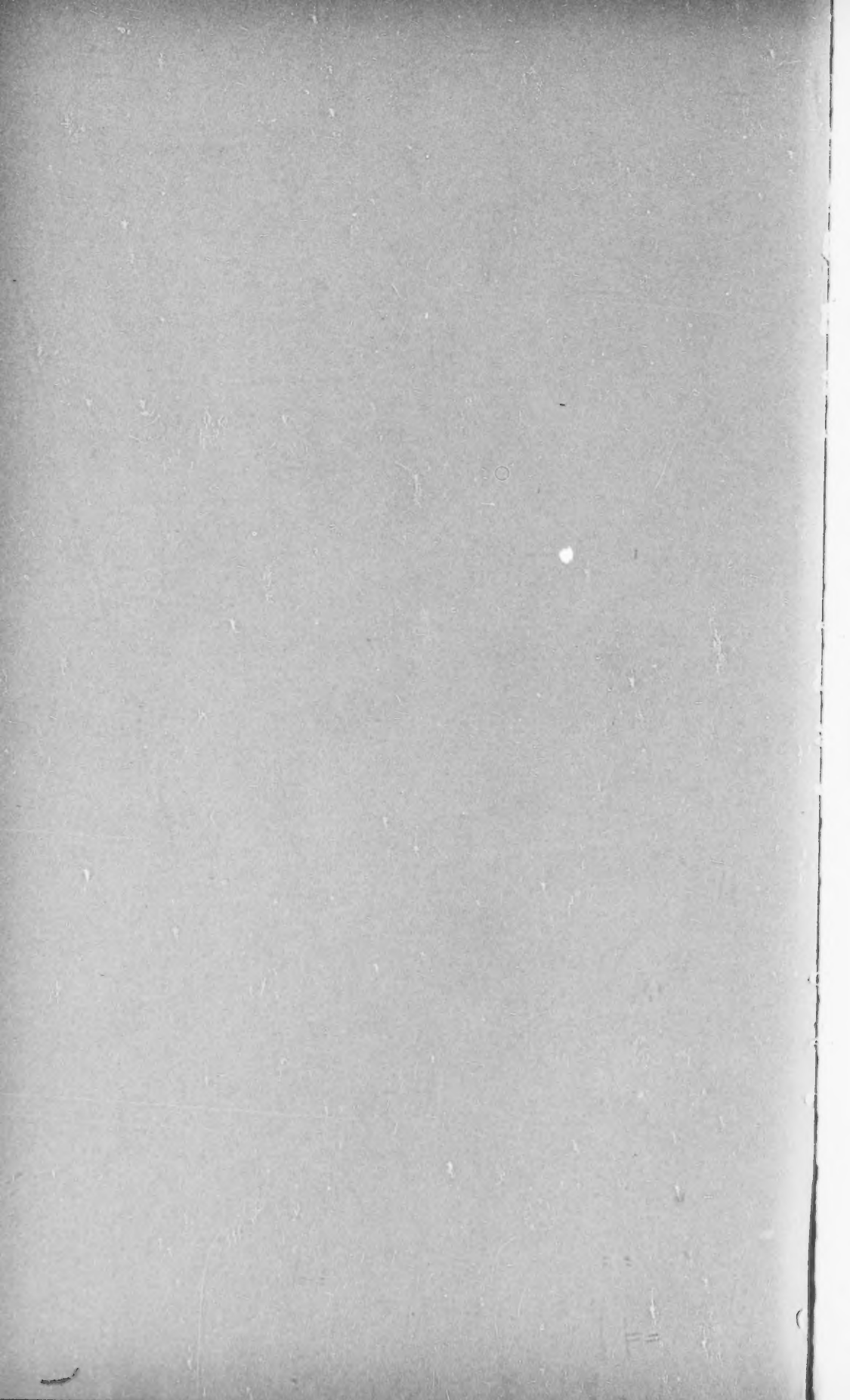
*Of Counsel:*

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November 12, 1987

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Question Presented

Where petitioner was removed from judicial office by the New York State Court of Appeals upon stated charges, did it violate his right to due process for the Court to have commented in its opinion on material in the record relevant to but not precisely verbalized in the charges?



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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1987  
No. 87-736

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Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

Petitioner,

v.

New York State Commission  
on Judicial Conduct,

Respondent.

---

On Petition for a Writ of  
Certiorari to the Court of Appeals  
of the State of New York

---

BRIEF FOR RESPONDENT IN OPPOSITION

---

Respondent New York State  
Commission on Judicial Conduct  
("Commission") prays that the Petition of  
Bertram R. Gelfand for a Writ of  
Certiorari be denied.

Opinion Below

The opinion of the Court to which petitioner requests that a Writ of Certiorari be directed, is reported at 70 NY2d 211 and is reproduced in the appendix to the petition (Pet. App. 37-46).<sup>1</sup> The opinion of the Court of Appeals to remove petitioner from the office of Surrogate was based upon review of the record of an unreported determination of the Commission, which is also reproduced in the appendix to the petition (Pet. App. 6-36). The Commission's determination was based upon the record of a hearing and proceedings pursuant to stated charges served upon petitioner in a Formal Written Complaint, which is also

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<sup>1</sup>References to "Pet." are to pages of the petition. References to "Pet. App." are to pages of the appendix to the petition.

reproduced in the appendix to the petition (Pet. App. 1-5).

United States Constitutional  
Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states:

[No state] shall deprive any person of life, liberty, or property, without due process of law.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states:

...nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitutional  
Provisions Involved

Article 6, Section 22(a) of the New York State Constitution states:

There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate,



investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

Article 6, Section 22(d) of the New York State Constitution states:

In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on

judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

### New York Statutes Involved

#### New York Judiciary Law Section

44(4) states:

If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved, either personally or by certified mail, return receipt requested. The judge shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the judge involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the judge, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the judge without cost copies of all

documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the judge at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the judge. The complainant may be notified of the hearing and unless he shall be subpoenaed as a witness by the judge, his presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the judge involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The judge shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

New York Judiciary Law Section

44(7) states:

After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals. The judge involved may either accept the determination of the commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals. If the commission has determined that a judge be admonished or censured, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the commission shall thereupon admonish or censure him in accordance with its findings. If the commission has determined that a judge be removed or retired, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon order his removal or retirement in accordance with the findings of the commission.

New York Judiciary Law Section

44(9) states:

In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction.

Question Presented

Where petitioner was removed from judicial office by the New York State Court of Appeals upon stated charges, did it violate his right to due process for the Court to have commented in its opinion on material in the record relevant to but not precisely verbalized in the charges?

Statement of the Case

The background of this case is substantially set forth in the opinion of the Court of Appeals in Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211 (1987) and in the determination of the Commission in Matter of Gelfand, unreported -- both of which are reproduced in the appendix to the petition (Pet. App. 6-46).

Petitioner was the Surrogate of Bronx County, New York. Pursuant to Judiciary Law Section 44(4), he was served with a Formal Written Complaint in June 1986 alleging various acts of misconduct (Pet. App. 1-5), and a hearing was held thereupon. Pursuant to Judiciary Law Section 44(7), the Commission thereafter determined that petitioner should be removed from judicial office. In its subsequent review of the

Commission's determination and the record of the proceedings upon which it was based, the Court of Appeals, pursuant to Article 6, Section 22(d), of the State Constitution and Judiciary Law Section 44(9), removed petitioner from office, in a reported opinion. Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211 (1987).

It is petitioner's apparent contention that, by commenting in its opinion on matters purportedly outside the scope of the stated charges, the Court of Appeals denied him his right to due process and equal protection of the law.

ARGUMENT

- I. The Petition Fails To Demonstrate That Petitioner's Due Process Rights Were Violated, In That Petitioner Had Clear And Ample Notice Of The Charges Against Him And Was Removed From Office On Those Charges
- 

It is readily apparent that neither the Court of Appeals nor the Commission violated any right afforded to petitioner under the Constitution or laws of the United States, or the Constitution or laws of the State of New York.

Petitioner was duly served with stated charges of misconduct in office (Pet. App. 1-5). A hearing and other proceedings were held on those charges (Pet. App. 6-7). The Commission determined on the record of those proceedings -- including petitioner's "repeated lack of candor" on the witness stand -- that petitioner should be removed from office (Pet. App. 6-28). The Court of Appeals,



upon review of the entire record, thereafter accepted the Commission's determination and removed petitioner from his judicial office, concluding specifically that the stated charges which gave rise to the proceedings were sustained and constituted cause for petitioner's removal (Pet. App. 45).

The petition seems to argue that petitioner's due process rights were violated because the Court of Appeals, in its removal opinion, did not repeat precisely the language set forth in the charges against him.<sup>2</sup> As such,

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<sup>2</sup> Nowhere is this more evident than when petitioner accuses the Court of exceeding the charges by finding that he made "threats" against court officials and others out of "personal vengeance" against a female law assistant who had ended their "sexual relationship" (Pet. 17-18). The Formal Written Complaint charges petitioner, inter alia, with telling the law assistant she was "off the payroll" based  
(Footnote Continued)

petitioner totally misapprehends the purpose of an accusatory instrument.

Due process requires that a person be given adequate notice and opportunity to be heard before the government deprives him of his liberty or property. Cleveland Board of Education v. Loudermill, 470 US 532, 541 (1985); Memphis Light, Gas & Water Division v. Craft, 436 US 1 (1978). Moreover, due process demands that "notice [be] of such nature as reasonably to convey the required information..." Mullane v.

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(Footnote Continued)

on "personal reasons" in connection with their "personal relationship"; then acting out of "personal animus" to prevent her future employment in the courts; then having "threatened" to speak to the lawyer-parents of her new boyfriend, whose mother was an employee of petitioner's court; and then meeting with and indicating to her new employer his "displeasure" at her having been employed (Pet. App. 2-4). The Court's language, while not mimicry, is utterly consistent with the charges.

Central Hanover Bank & Trust Co., 399 US  
306, 313-14 (1950). In the instant  
proceeding, petitioner received clear,  
adequate and actual notice and opportuni-  
ty to be heard on the charges against him  
(Pet. App. 1-5).

The Formal Written Complaint  
charged petitioner with a course of  
misconduct relative to his telling his  
female law assistant in August 1985 -- in  
connection with their personal relation-  
ship and unrelated to her official duties  
-- that she was "off the payroll" as a  
court employee. In addition, the Com-  
plaint charged petitioner with removing  
the law assistant's personal effects from  
her office on August 3rd and delivering  
them in boxes to her home, for personal  
reasons unrelated to her official duties;  
leaving obscene, annoying and otherwise  
offensive messages on her telephone  
answering machine over a six-and-a-half

week period; falsely identifying himself to a building doorman as his law assistant's attorney; confronting the law assistant's new male friend about their relationship and threatening to speak to the friend's employer (the District Attorney) about his conduct; leaving offensive messages on the friend's telephone answering machine and threatening to speak to the friend's parents in his efforts to reach the law assistant; requesting, because of personal animus toward the law assistant, that the Deputy Chief Administrative Judge view unfavorably her applications for future employment in the courts; and thereafter meeting with the law assistant's new employers and indicating his displeasure at their having employed her as an associate in their law firm.

The Formal Written Complaint also enumerated the specific sections of

the Rules Governing Judicial Conduct which petitioner was charged with having violated.

These detailed charges gave petitioner clear and actual notice of the complaint against him and as such met this Court's notice requirement as set forth in Loudermill, Memphis Light and Mullane, supra.

At the hearing, the referee properly "allowed relevant evidence of events predating the alleged misconduct in order to clarify or provide background for the formal charges" (Pet. App. 44). It is, of course, axiomatic that evidence relevant to stated charges may be adduced at trial without compromising due process.

The Court of Appeals in its opinion commented upon relevant matters properly adduced into the evidentiary record before the referee. Petitioner

now avers that such commentary violated his due process rights in that they exceeded the scope of the charges and he was without notice to defend against them. Ironically, as the record of the proceedings and the briefs to the Court of Appeals unequivocally demonstrate, most of the material which petitioner now asserts was outside the scope of the charges was, in fact, introduced into the record by petitioner himself!

The Court explicitly limited itself to removing petitioner on the basis of the conduct specifically set forth in the charges against him, noting "that the acts that were described in the formal complaint and proven at the hearing constitute sufficient cause for removal" (Pet. App. 45). Indeed, a simple reading of the charges (Pet. App. 1-5) and the Court's opinion (Pet. App. 37-46) demonstrates the consistency

between what was charged and what was found. Thus, the Court of Appeals met this Court's due process standard in In re Ruffalo, 390 US 544 (1968) -- petitioner was disciplined for what he was charged with; he was not charged with one type of misconduct and removed from office for another. It was entirely appropriate for the Court of Appeals to make reference in its opinion to material deemed relevant to the charges and otherwise properly in the record of proceedings before it.

#### CONCLUSION

Petitioner has not demonstrated that he was deprived of a constitutional right to due process by the New York State Commission on Judicial Conduct or the New York State Court of Appeals.

For the reasons stated above,  
respondent prays that the Petition for a  
Writ of Certiorari be denied.

Respectfully submitted,

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Dated: New York, New York  
November 12, 1987

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No. 87-736

Supreme Court, U.S.

FILED

NOV 27 1987

JOSEPH F. SPANIOL,  
CLERK

IN THE

**Supreme Court of the United States**

October Term, 1987

Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

*Petitioner,*

v.

New York State Commission on Judicial Conduct,

*Respondent.*

**On Petition for a Writ of Certiorari to the  
Court of Appeals of the State of New York**

**REPLY BRIEF OF PETITIONER**

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231987



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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-736

---

Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

Petitioner,

v.

New York State Commission  
on Judicial Conduct,

Respondent.

---

On Petition for a Writ of  
Certiorari to the Court of Appeals  
of the State of New York

---

REPLY BRIEF OF PETITIONER

---

Petitioner, BERTRAM R. GELFAND,  
submits this reply brief and prays that  
his petition for Certiorari be granted and  
respectfully suggests that summary  
reversal be considered by this Court.

POINT I

RESPONDENT'S BRIEF IN OPPOSITION MISSTATES THE "QUESTION PRESENTED".

Respondent seeks to obfuscate the issues presented by posing a "Question Presented" (Resp. 8)\* that misconstrues the opinion of the New York Court of Appeals (Pet. App. 37 to 46).\*\* It is disingenuous to contend that the most serious findings made by the Court of Appeals are in any way related to the charges in the Formal Complaint.

Except for the allegations in Charges I (b) and I (g),\*\*\* the balance of

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\*References to "Resp." are to pages in respondent's brief in opposition.

\*\*References to "Pet." are to pages of the petition. References to "Pet. App." are to pages of the appendix to the petition.

\*\*\*As to Charge I (b), it is not disputed that this event occurred on Saturday and that petitioner sought to rectify it by the next day. As to Charge I (g), although it is alleged that what petitioner said to Judge Williams was  
(Continued on next page)



the charges relate to allegations of misconduct in Petitioner's private life after August 3, 1985 and prior to December 5, 1985.

If the commission wished to level charges other than those in the Formal Written Complaint, it had the power to do so (N.Y. Judiciary Law, Section 44 (4) set forth at Resp. 5). Had it so proceeded petitioner would have had notice of these charges and had the opportunity to defend himself.

While the Court of Appeals condemns the commission for going beyond the charges, it quotes as fact the most inflammatory illustrations of this improper course. The Court states:

"....the referee found that petitioner had misused his position

-----  
motivated by animus, no issue was ever raised as to the professional accuracy of his statements to Judge Williams.

throughout the entire course of the affair to prolong the relationship. The Commission determined that petitioner engaged in a course of misconduct throughout the duration of the relationship..." (Pet. App. 39)

There can be no better evidence of the irretrievably extreme extent to which the record reviewed by the Court of Appeals is tainted than this inflammatory reference to allegations that are beyond the charges in the Formal Complaint.

The allegations in the Formal Complaint are bland against the Court of Appeals' determination that petitioner acted "in order to prolong a sexual relationship with a law assistant" (Pet. App. 40). There is not a single allegation in the Formal Complaint that remotely constitutes an allegation that petitioner did anything improper "in order to prolong a sexual relationship".

The arguments in respondent's

brief (Resp. 12-13) that the phrase in the Formal Complaint "for personal reasons" that appears in Charges I (a) and I (b) (Pet. App. 2-3) constitute notice that petitioner was charged with "making administrative and personnel decisions, taking official actions, \*\*\*to prolong a sexual relationship" [emphasis added] (Pet. App. 40) are no less than disingenuous. Neither of these charges relate to any official "action". In the undisputed context of the matter, Charge I (a) clearly is an allegation of doing no more than saying something due to personal anger. Charge I (b) relates to delivering Ms. Gertel's personal possessions to her out of personal anger. The acts alleged in both charges could hardly be construed as conduct designed to "prolong a sexual relationship". Likewise, there is not a single allegation accusing petitioner of

seeking "to exact personal vengeance"  
(Pet. App. 40).

The ultimate misstatement of the charges of the Formal Complaint is the conclusion of the Court of Appeals that, "On August 3, 1985, petitioner fired the law assistant based on events in their personal relationship." As is more fully discussed on pages 9 and 10 of the petition, it is not disputed that petitioner was never accused of wrongfully firing his law assistant, nor did he fire her on August 3, 1985.

Respondent does not dispute the statement in the petition that the deftly worded Charge I (a), is not an accusation that petitioner fired Ms. Gertel on August 3. It is merely an allegation that he made a never acted upon statement on August 3 accelerating her departure date pursuant to her earlier July 21, 1985

resignation (Pet. 9-10). It is undisputed that this statement was withdrawn on August 4, 1985.

Ms. Gertel's resignation, and the circumstances surrounding it, were fully investigated. It is undisputed that her employment terminated on July 21, 1985. No charge appears in the complaint related to her actual termination.

The ultimate proof that the Court of Appeals denied petitioner his office for uncharged conduct, is the conclusion that he officially acted in order "to prolong a sexual relationship". (Emphasis added) Likewise, there is no possible way that the allegations in the Formal Complaint as to private conduct for "personal reasons" from August 3, 1985 forward can relate to a conclusion as to "Petitioner's repeated misuse of his judicial powers" (Pet. App. 42).

Nor can the Formal Complaint, whose allegations begin thirteen days after Ms. Gertel's termination be notice to petitioner that he was charged with "...allowing his personal relationships to influence both his judgement and the administration of the court over which he presides --- he could not help but impair public confidence in his integrity and impartiality" (Emphasis Added) (Pet. App. 43) The emphasized language is a pure speculation that is not only beyond the charges in the complaint, but inconsistent with the second sentence of the Court of Appeals' opinion (Pet. App. 37)

The "Questions Presented" are not as respondent argues, that the Court of Appeals failed to precisely repeat the language of the complaint (Resp. 12-13). The Court of Appeals either totally misapprehended the charges or went on to

create new charges of its own. Between an opening statement in the opinion that the events of August 3, 1985 to December 31, 1985\* warranted removal (Pet App. 37) and a closing conclusion "that the acts described in the Formal Complaint constitute sufficient cause for removal" (Pet. App. 45), the Court of Appeals opinion is permeated with repeated "extensive findings of fact and legal conclusions based on uncharged incidents --- often of a sensational nature, \*\*\*" the very conduct for which it criticizes the commission (Pet. App. 44). The denial of due process that flows from findings of inflammatory uncharged conduct cannot be cured by intermingling alleged charged conduct and conclusory statements at the beginning and the end of a lengthy

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\*No charges in the complaint involves a date beyond December 5, 1985.

opinion, when the opinion is permeated with findings of uncharged conduct.

The inflammatory uncharged conduct clearly had a profound influence on the conclusion as to "lack of candor". This is particularly clear when the bulk of the commission's finding on lack of candor relate to uncharged conduct. The degree of prejudice on the issue of candor is directly related to the findings of the uncharged conduct.

Clearly, in present day thinking a conclusion that a male employer has taken advantage of a female employee rightly places the employer in the posture of an ogre. Who would accept anything said by an ogre, no matter how true? It is the uncharged conduct that converts petitioner from a highly respected jurist (Pet 18-19, footnote), into a person not to be believed on any subject.



Respondent's brief misstates the content of Pet. 17-18 (Resp. 12-13, footnote 2).

## POINT II

THE HEADNOTE OF THE OFFICIAL  
STATE REPORT OF THIS CASE  
REFUTES RESPONDENT'S CLAIM  
THAT THE FINDINGS BEYOND THE  
CHARGES ARE MERE COMMENT.

The headnote on the official report of the opinion of the New York Court of Appeals is prepared by the Official State Reporter, an appointee and functionary of the New York Court of Appeals.

The first and primary headnote on the Official Report of the Court of Appeals' opinion commences as follows:

"1. A determination of respondent State Commission on Judicial Conduct that petitioner be removed from the office of Surrogate, Bronx County, is accepted. Petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court

officials and others in order to prolong a sexual relationship with a law assistant and later, to exact personal vengeance when she refused to continue their affair." (Matter of Gelfand, 70 NY2d 211)

The official report of the Court of Appeals determination is raised for the first time in respondent's brief (Resp. 10). It was not available when the petition was filed.

The contention in respondent's brief that the Court of Appeals' conclusion that petitioner acted "in order to prolong a sexual relationship with a law assistant" is a mere comment is belied by the headnote. Respondent asks this court to interpret the opinion of the Court of Appeals in a manner that is not only contrary to its clear language, but contrary to the interpretation of the Court of Appeals' own official reporter. The damaging nature of the finding relative to using one's position to obtain

sexual advantage is so serious that it cannot help but establish that the entire thinking of the Court of Appeals in embracing the sanction of removal was colored beyond redemption by injection into the case of uncharged serious sexual misconduct. At the very least, it is far from clear that without this uncharged conduct the sanction of removal would have been sustained. It is little wonder that other branches of government embrace with impunity unjustified attacks on the hard earned reputation of jurists in order to pander to the media, when judges of the highest court of a state themselves have no greater respect for the reputations of their fellow jurists.

POINT III

RESPONDENT'S BRIEF DOWNPLAYS  
THE GRAVITY OF THE INJUSTICE  
THAT JUSTIFIES THE GRANTING  
OF CERTIORARI.

Mr. Justice White in Cleveland  
Board of Education v. Loudermill, 470 U.S.  
532, 543, wrote for the majority:

"First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. (Citations Omitted) While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job."

In the instant case, petitioner, at the age of 57, has not only lost his judicial position.\* His standing in the legal profession and the community has been so devastated by the uncharged conclusion that he used his position to

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\*A position that he occupied with distinction for over 14 years and to which he had tenure of an additional 13 1/2 years.

prolong a sexual relationship so as to deny petitioner the opportunity for any meaningful employment remotely commensurate with his competence, experience and skill, either of a legal or administrative nature. The violation of petitioner's right to due process has literally destroyed his life.

POINT IV

RESPONDENT'S BRIEF MISTAKENLY  
SEEKS TO SUSTAIN THE COURT OF  
APPEAL'S UNCONSTITUTIONAL USE  
OF JUDICIARY LAW, SECTION 44 (9)

In this case the New York Court of Appeals' utilization of Judiciary Law, Section 44 (9) is unconstitutional. By making its own new findings of fact on issues not in the Formal Complaint, it finds petitioner guilty of charges of which he never had notice. This improper use of the statute in and of itself constitutes a denial of due process as is more fully discussed at pages 13-14 of the

petition.

POINT V

WHERE THE PETITION CLEARLY  
MANDATES REVERSAL AND A NEW  
HEARING, SUMMARY REVERSAL IS  
JUSTIFIED.

It is respectfully submitted  
that all that is necessary to establish  
petitioner's right to relief is a  
comparison of the Formal Complaint (Pet.  
App. 1-5) with the Opinion of the Court of  
Appeals (Pet. App. 37-46). Such a  
comparison establishes petitioner's right  
to relief under the authority of In re  
Ruffalo, 390 U.S. 544.

Judicial economy and  
consideration for the burdens of the  
individual litigant coping with the  
immense resources of the sovereign  
justifies the utilization of summary  
reversal. (Board of Education of Rogers,  
Arkansas v. Mc Cluskey, 458 U.S. 966;

Eckerd Drugs Inc. v. Brown, 457 U.S. 1128;  
Lane v. Smith, 457 U.S. 1102; Alabama v.  
Ritter, 454 U.S. 885; Harris v. Rivera,  
454 U.S. 339; Jago v. Van Curen, 454 U.S.  
14; Shipley v. California, 395 U.S. 818)

#### CONCLUSION

1. Petitioner has been deprived of the valuable property right of his office without due process.

2. In addition petitioner has been stripped of his reputation and professional standing by being removed from office based upon uncharged conduct of a sexual nature without due process.

3. That the injustice is of sufficient gravity to justify the granting of certiorari, particularly where certiorari is the sole avenue for any review of the only court involved in the matter.

4. That the issue is of

sufficient wide-spread importance so as to justify the granting certiorari. If the New York Court of Appeals can deny a tenured public servant of his position based upon uncharged acts, then the tenure of not only New York's approximately 3,300 judges, but the tenure of the state's hundreds of thousands of public employees is at the unfettered mercy of arbitrary extinction.

5. That respondent's brief presents no issue which would preclude this court embracing the course of summary reversal.

Respectfully submitted,

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November 23, 1987



